Dime
7

Alan Potts

(Chase)

AN

TRIAL

OF

SAMUEL CHASE,

AN ASSOCIATE JUSTICE

OF THE

SUPREME COURT OF THE UNITED STATES,

IMPEACHED

BY THE

HOUSE OF REPRESENTATIVES,

FOR

HIGH CRIMES AND MISDEMEANORS,

BEFORE THE

SENATE OF THE UNITED STATES.

TAKEN IN SHORT-HAND,

BY SAMUEL H. SMITH AND THOMAS LLOYD.

VOLUME I.

WASHINGTON CITY:

PRINTED FOR SAMUEL H. SMITH.

.....

1805.

DISTRICT OF COLUMBIA, *to wit:*

SEAL.

BE IT REMEMBERED, that on this twenty third day of April, in the year of our Lord eighteen hundred and five, Samuel H. Smith, of the said district, hath deposited in the clerk's office of the district court of the United States for the district of Columbia, the title of a book the right whereof he claims as author, in the words following, to wit: "The trial of Samuel Chase, an associate "justice of the supreme court of the United States, impeached by the House "of Representatives for high crimes and misdemeanors, before the Senate "of the United States, taken in short hand by Samuel H. Smith and Thomas "Lloyd," in conformity to the act of Congress of the United States entitled an act for the encouragement of learning by securing the copies of maps, charts and books to the authors and proprietors of such copies during the time therein mentioned.

G. DENEALE, CLK. DIST. COLUM.

THE following report of the trial of Samuel Chase has been drawn up with the greatest care. To guard against misconception or omission, two individuals, one of whom is a professional stenographer, were constantly engaged during the whole course of the trial; and the arguments of the managers and counsel have in most instances, and wherever it was attainable, been revised by them. It is with some satisfaction that the editor of this impression is enabled, under these circumstances, to submit to the public a tract, whose fidelity and comprehensiveness, he hopes, will amply reward the interest so deeply excited by the progress and issue of this important trial.

The second volume is in the press, and will be published in a short time.

IMPEACHMENT OF SAMUEL CHASE.

MEASURES PRELIMINARY TO THE TRIAL.

ON the fifth day of January 1804, Mr. *J. Randolph*, a member of the House of Representatives of the United States, rose and addressed that body to the following effect:

He observed "That no people were more fully impressed with the importance of preserving unpolluted the fountain of justice than the citizens of these states. With this view the constitution of the United States, and of many of the states also, had rendered the magistrates who decided judicially between the state and its offending citizens, and between man and man, more independent than those of any other country in the world, in the hope that every inducement, whether of intimidation or seduction, which could cause them to swerve from the duty assigned to them, might be removed. But such was the frailty of human nature, that there was no precaution by which our integrity and honor could be preserved, in case we were deficient in that duty which we owed to ourselves. In consequence, sir," said Mr. Randolph, "of this unfortunate condition of man, we have been obliged, but yesterday, to prefer an accusation against a judge of the United States, who has been found wanting in his duty to himself and his country. At the last session of Congress, a gentleman from Pennsylvania did, in his place, (on a bill to amend the judicial system of the United States) state certain facts, in relation to the official conduct of an eminent judicial character, which I then thought, and still think, the House bound to notice. But the lateness of the session (for we had, if I mistake not, scarce a fortnight remaining) precluding all possibility of bringing the subject to any efficient result, I did not then think proper to take any steps in the business: Finding my attention, however, thus drawn to a consideration of the character of the officer in question, I made it my business, considering it my duty, as well to myself as those whom I represent, to investigate the charges then made and the official character of the judge, in general. The result having convinced me that there exists ground of impeachment against this officer, I demand an enquiry into his conduct, and therefore submit to the House the following resolution:

Resolved, That a committee be appointed to enquire into the official conduct of SAMUEL CHASE, one of the associate justices of the supreme court of the United States, and to report their opinion, whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the constitutional power of this House."

A short debate immediately arose on this motion, which was advocated by Messrs. J. Randolph, Smilie, and J. Clay; and opposed by Mr. Elliot. Several members supported a motion to postpone it until the ensuing day, which was superseded by an adjournment of the House.

The House, on the next day, resumed the consideration of Mr. Randolph's motion, which was supported by Mr. Smilie, and, on the motion of Mr. Leib, so amended as to embrace an enquiry into the official conduct of Richard Peters, district judge for the district of Pennsylvania. On the motion, thus amended, further debate arose, which occupied the greater part of this and the ensuing day. It was supported by Messrs. Findley, Jackson, Nicholson, Holland, J. Randolph, Eustis, Early, Smilie, and Eppes; and opposed by Messrs. Lowndes, R. Griswold, Elliot, Dennis, Griffin, Thatcher, Huger, and Dana. Some ineffectual attempts were made to amend the resolution, when the final question was taken on the resolution, as amended, in the following words:

Resolved, That a committee be appointed to enquire into the official conduct of Samuel Chase, one of the associate justices of the supreme court of the United States, and of Richard Peters, district judge of the district of Pennsylvania, and to report their opinion, whether the said Samuel Chase and Richard Peters, or either of them, have so acted in their judicial capacity, as to require the interposition of the constitutional power of this house.

And resolved in the affirmative, Yeas 81....Nays 40; as follow:

Those who voted in the affirmative, are,

Willis Alston, junior, Nathaniel Alexander, David Bard, George Michael Bedinger, Phanuel Bishop, William Blackledge, Adam Boyd, John Boyle, Robert Brown, Joseph Bryan, William Butler, Levi Casey, Joseph Clay, John Clopton, Jacob Crowninshield, Richard Cutts, William Dickson, John B. Earle, Peter Early, Ebenezer Elmer, John W. Eppes, William Eustis, William Findley, John Fowler, James Gillespie, Edwin Gray, Andrew Gregg, John A. Hanna, Josiah Hasbrouck, William Hoge, James Holland, David Holmes, John G. Jackson, Walter Jones, William Kennedy, Nehemiah Knight, Michael Leib, John B. C. Lucas, Matthew Lyon, Andrew M'Cord, David Meriwether, Nicholas R. Moore, Thomas Moore, Jeremiah Morrow, Anthony New, Thomas Newton, junior, Joseph H. Nicholson, Gideon Olin, Beriah Palmer, John Patterson, Oliver Phelps, John Randolph, junior, Thomas M. Randolph, John Rea, (of Pennsylvania) John Rhea, (of Tennessee) Jacob Richards, Erastus Root, Thomas Sammons, Thomas Sandford, Ebenezer Seaver, Tompson J. Skinner, James Sloan, John Smilie, John Smith, (of Virginia) Richard Stanford, Joseph Stanton, John Stewart, David Thomas, Philip R. Thompson, Abram Trigg,

John Trigg, Philip Van Cortlandt, Isaac Van Horne, Joseph B. Varnum, Daniel C. Verplank, Matthew Walton, John Whitehill, Marmaduke Williams, Richard Winn, Joseph Winston, and Thomas Wynns.

Those who voted in the negative, are,

Simeon Baldwin, Silas Betton, John Campbell, William Chamberlin, Martin Chittenden, Clifton Claggett, Manasseh Cutler, Samuel W. Dana, John Davenport, John Dennis, Thomas Dwight, James Elliott, Thomas Griffin, Gaylord Griswold, Roger Griswold, Seth Hastings, David Hough, Benjamin Huger, Samuel Hunt, Joseph Lewis, junior, Thomas Lewis, Henry W. Livingston, Thomas Lowndes, Nahum Mitchell, Samuel L. Mitchill, James Mott, Thomas Plater, Samuel D. Purviance, Joshua Sands, John Cotton Smith, John Smith, (of New York) William Stedman, James Stephenson, Samuel Taggart, Samuel Tenney, Samuel Thatcher, George Tibbits, Killian K. Van Rensellaer, Peleg Wadsworth, and Lemuel Williams.

Whereupon, Messrs. J. Randolph, Nicholson, J. Clay, Early, R. Griswold, Huger, and Boyle, were appointed a committee pursuant to the foregoing resolution.

On the 10th of January, the committee were authorised by the House to send for persons, papers, and records; and on the 30th day of the same month, they were authorised to cause to be printed such documents and papers, as they might deem necessary, previous to their presentation to the House.

On the 6th day of March, Mr. Randolph, in the name of the committee, made a report, "That in consequence of the evidence collected "by them, in virtue of the powers with which they have been invested "by the House, and which is hereunto subjoined, they are of opinion, "1st, That Samuel Chase, esquire, an associate justice of the supreme "court of the United States, be impeached of high crimes and misde- "meanors."

"2d. That Richard Peters, district judge of the district of Pennsyl- "vania, hath not so acted in his judicial capacity as to require the inter- "position of the constitutional power of this House."

This report, accompanied by a great mass of printed documents, embracing various depositions taken before the committee, as well as at a distance, was made the order of the day for the Monday following.

On that day the House took up the report, and after a short debate concurred in the first resolution by the following votes, Yeas 73...Nays 32.

Those who voted in the affirmative, are,

Willis Alston, junior, Isaac Anderson, John Archer, David Bard, George Michael Bedinger, William Blackledge, Walter Bowie, Adam Boyd, John Boyle, Robert Brown, Joseph Bryan, William Butler, Levi Casey, Thomas Claiborne, Joseph Clay, Matthew Clay, John Clopton, Frederick Conrad, Jacob Crowninshield, Richard Cutts, John Dawson, William Dickson, John B. Earle, Peter Early, James Elliott, William Findley, John Fowler, James

Gillespie, Peterson Goodwyn, Andrew Gregg, Samuel Hammond, James Holland, David Holmes, Walter Jones, William Kennedy, Nehemiah Knight, Michael Leib, Matthew Lyon, Andrew M'Cord, William M'Creery, David Meriwether, Andrew Moore, Nicholas R. Moore, Jeremiah Morrow, Anthony New, Thomas Newton, junior, Joseph H. Nicholson, Gideon Olin, John Patterson, John Randolph, Thomas M. Randolph, John Rea, (of Pennsylvania) John Rhea, (of Tennessee) Jacob Richards, Cæsar A. Rodney, Thomas Sammons, Thomas Sandford, Ebenezer Seaver, James Sloan, John Smilie, Henry Southard, Richard Stanford, Joseph Stanton, John Stewart, David Thomas, Philip R. Thompson, Abram Trigg, John Trigg, Isaac Van Horne, Joseph B. Varnum, Marmaduke Williams, Richard Winn, and Joseph Winston.

Those who voted in the negative, are,

Simeon Baldwin, Silas Betton, John Campbell, William Chamberlin, Martin Chittenden, Clifton Claggett, Manasseh Cutler, Samuel W. Dana, John Davenport, Thomas Dwight, Thomas Griffin, Gaylord Griswold, Roger Griswold, Seth Hastings, William Helms, Benjamin Huger, Joseph Lewis, junior, Henry W. Livingston, Thomas Lowndes, Nahum Mitchell, Thomas Plater, Samuel D. Purviance, John Cotton Smith, John Smith, (of Virginia) William Stedman, James Stephenson, Samuel Taggart, Samuel Tenney, Samuel Thatcher, Killian K. Van Rensselaer, Peleg Wadsworth, and Lemuel Williams.

The second resolution was agreed to unanimously.

Whereupon it was ordered, that Mr. John Randolph and Mr. Early, be appointed a committee to go to the Senate, and at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, to impeach Samuel Chase, one of the associate justices of the supreme court of the United States, of high crimes and misdemeanors; and acquaint the Senate, that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same. It was also ordered, that the committee do demand, that the Senate take order for the appearance of the said Samuel Chase, to answer to the said impeachment.

On the 13th of March, Messrs. J. Randolph, Nicholson, J. Clay, Early, and Boyle, were appointed a committee to prepare and report articles of impeachment against Samuel Chase, and invested with power to send for persons, papers, and records.

On the 14th, a message was received from the Senate, notifying the House, that they would take proper order on the impeachment, of which due notice should be given to the House.

On the 26th, Mr. Randolph, from the committee appointed for that purpose, reported articles of impeachment against Samuel Chase. No order was taken on the report during the remainder of the session, which terminated the next day.

At the ensuing session of Congress, on the 6th of November, on the motion of Mr. J. Randolph, the articles of impeachment were referred to Messrs. J. Randolph, J. Clay, Early, Boyle, and J. Rhea, of Tennessee.

On the 30th of November, Mr. Randolph reported the following articles of impeachment against Samuel Chase, in substance, not dissimilar from those reported at the last session, with the addition of two new articles:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the supreme court of the United States, in maintenance and support of their impeachment against him, for high crimes and misdemeanors.

ARTICLE I.

That, unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz.

1. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence:

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client:

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give:

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties, as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the constitution, and was condemned to death without having been heard by counsel, in his defence, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people.

ARTICLE II.

That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James

Thompson Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress, and procure the conviction of, the said Callender, did over-rule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind, as to the publication from which the words, charged to be libellous, in the indictment, were extracted; and the said Basset was accordingly sworn and did serve on the said jury, by whose verdict the prisoner was subsequently convicted.

ARTICLE III.

That, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact.

ARTICLE IV.

That the conduct of the said Samuel Chase, was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance; viz.

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission, or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term.

3. In the use of unusual, rude, and contemptuous expressions towards the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend:

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which, at length, induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment:

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge as it was subversive of justice.

ARTICLE V.

And whereas it is provided by the act of Congress, passed on the 24th day of September, 1789, intituled "An act to establish the judicial

courts of the United States," that for any crime, or offence, against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the state where such offender may be found: and whereas, it is provided by the laws of Virginia, that, upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person, or persons offending, to appear and answer such presentment at the next court; yet, the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thompson Callender, indicted for an offence not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

ARTICLE VI.

And whereas it is provided by the 34th section of the aforesaid act, intituled "An act to establish the judicial courts of the United States," that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require, or provide, shall be regarded as the rules of decision in trials at common law, in the courts of the United States, in cases where they apply: and whereas, by the laws of Virginia it is provided, that in cases not capital, the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall have been made, yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial, during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

ARTICLE VII.

That, at a circuit court of the United States, for the district of Delaware, held at Newcastle, in the month of June, one thousand eight hundred, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer, by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury, that he, the said Samuel Chase, understood "that a highly seditious temper had manifested it-"self in the state of Delaware, among a certain class of people, parti-"cularly in Newcastle county, and more especially in the town of Wil-"mington, where lived a most seditious printer, unrestrained by any prin-"ciple of virtue, and regardless of social order;" that the name of this "printer was"....but checking himself, as if sensible of the indecorum which he was committing, added, "that it might be assuming too much "to mention the name of this person, but it becomes your duty, gentle-"men, to enquire diligently into this matter," or words to that effect:

and that with intention to procure the prosecution of the printer in question, the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring a file of the papers to which he alluded, (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser,") and, by a strict examination of them, to find some passage which might furnish the ground-work of a prosecution against the printer of the said paper; thereby degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare.

ARTICLE VIII.

And whereas mutual respect and confidence between the government of the United States and those of the individual states, and between the people and those governments, respectively, are highly conducive to that public harmony, without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court, for the district of Maryland, held at Baltimore, in the month of May, one thousand eight hundred and three, pervert his official right and duty to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their state government, and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States: and moreover, that the said Samuel Chase, then and there, under pretence of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion and in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any farther articles, or other accusation, or impeachment, against the said Samuel Chase, and also of replying to his answers which he shall make unto the said articles, or any of them, and of offering proof to all and every the aforesaid articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them, as the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given, as are agreeable to law and justice.

This report was made the order for the 3d of December. On that and the ensuing day the House took the articles into consideration, to all of which they agreed, according to the following votes:

	Yeas.	Nays.		Yeas.	Nays
Article 1	83	34	Article 6 -	73	42
2	83	35	7 -	73	42
3	84	34	8 1st sect.	74	39
4	84	34	8 2d sect.	78	32
5	72	45			

On the 5th the House proceeded to the choice by ballot of seven managers to conduct the impeachment; and on counting the votes, Messrs. J. Randolph, Rodney, Nicholson, Early, Boyle, Nelson, and G. W. Campbell appeared to be elected.

On a subsequent day, Mr. Nelson having declined his appointment, on account of unavoidable absence, Mr. Clarke was chosen in his place.

The following resolution was then adopted:

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves, and of all the people of the United States, against Samuel Chase, in maintenance of their impeachment against him, for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

The Senate having appointed the 7th of December for receiving the articles of impeachment, the managers repaired on that day, at 1 o'clock, to the Senate chamber. Having taken seats assigned them within the bar; and the sergeant at arms having proclaimed silence, Mr. J. Randolph read the foregoing articles; whereupon the President of the Senate informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives. The managers delivered the articles of impeachment at the table and withdrew.

On the 10th of December, the Senate, sitting as a high court of impeachments, adopted the following resolution:

Resolved, That the secretary be directed to issue a summons to Samuel Chase, one of the associate justices of the supreme court of the United States, to answer certain articles of impeachment exhibited against him by the House of Representatives on Friday last; That the said summons be returnable the 2d day of January, and be served at least fifteen days before the return day thereof.

On the 24th and 31st of December, the Senate adopted the following *rules of proceeding*, to be observed in cases of impeachment.

1. Whensoever the Senate shall receive notice from the House of Representatives, that managers are appointed on their part, to conduct an impeachment against any person, and are directed to carry such articles to the Senate, the secretary of the Senate shall immediately inform the House of Representatives, that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to the said notice.

2. When the managers of an impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against any person, the President of the Senate shall direct the sergeant at arms to make proclamation; who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, articles of impeachment against ;" after which the articles shall be exhibited, and then the President of the Senate shall inform the managers, that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

3. A summons shall issue, directed to the person impeached, in the form following:

The United States of America, ss.

THE SENATE OF THE UNITED STATES OF AMERICA,

To *Greeting:*

Whereas, the House of Representatives of the United States of America, did, on the day of exhibit to the Senate, articles of impeachment against you, the said in the words following, viz:

(here recite the articles)

and did demand that you the said should be put to answer the accusations as set forth in said articles; and that such proceedings, examinations, trials, and judgments, might be thereupon had, as are agreeable to law and justice. You, the said are therefore hereby summoned, to be, and appear before the Senate of the United States of America, at their chamber in the City of Washington, on the day of then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the constitution and laws of the United States. Hereof you are not to fail.

Witness, Vice President of the United States of America, and President of the Senate thereof, at the City of Washington, this day of in the year of our Lord, and of the independence of the United States, the

Which summons shall be signed by the secretary of the Senate, and sealed with their seal, and served by the sergeant at arms to the Senate, or by such other person as the Senate shall specially appoint for that purpose; who shall serve the same, pursuant to the directions given in the form next following:

4. A precept shall be endorsed on said writ of summons, in the form following, viz:

United States of America, ss.

THE SENATE OF THE UNITED STATES,

To *Greeting:*

You are hereby commanded to deliver to, and leave with if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, shewing him both; or in case he cannot with convenience be found, you are to leave true and attested copies of the said summons and precept, at his usual place of residence, and in whichsoever way you perform the service, let it be done at least days before the appearance day mentioned in said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon endorsed, on or before the appearance day mentioned in said writ of summons.

Witness, Vice President of the United States of America, and President of the Senate thereof, at the City of Washington, this day of in the year of our Lord and of the independence of the United States, the

Which precept shall be signed by the secretary of the Senate, and sealed with their seal.

5. Subpœnas shall be issued by the secretary of the Senate, upon the application of the managers of the impeachment, or of the party impeached, or his counsel, in the following form, to wit:

To *Greeting:*

You, and each of you, are hereby commanded to appear before the Senate of the United States, on the day of at the Senate chamber in the City of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached Fail not.

Witness, Vice President of the United States of America, and President of the Senate thereof, at the City of Washington, this day of in the year of our Lord and of the independence of the United States, the

Which shall be signed by the secretary of the Senate, and sealed with their seal.

Which subpœnas shall be directed, in every case, to the marshal of the district, where such witnesses respectively reside, to serve and return.

6. The form of direction to the marshal, for the service of the subpœna, shall be as follows:

The Senate of the United States of America,

(SEAL.)

To the marshal of the district of

You are hereby commanded to serve and return the within subpœna, according to law.

Dated at Washington, this day of in the year of our Lord and of the independence of the United States, the

Secretary of the Senate.

7. The President of the Senate shall direct all necessary preparations in the Senate chamber, and all the forms of proceeding, while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial, not otherwise specially provided for by the Senate.

8. He shall also be authorised to direct the employment of the marshal of the district of Columbia, or any other person or persons, during the trial, to discharge such duties as may be prescribed by him.

9. At twelve o'clock of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended and the secretary of the Senate shall administer an oath to the returning officer, in the form following, viz. "I do solemnly swear, that the return made and subscribed by me, upon the process issued on the day of by the Senate of the United States, against is truly made, and that I have performed said services as therein described. So help me God." Which oath shall be entered at large on the records.

10. The person impeached shall then be called to appear, and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly, if by himself, or if by agent or attorney; naming the person appearing, and the capacity in which he appears. If he does not appear, either personally, or by agent or attorney, the same shall be recorded.

11. At twelve o'clock of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be postponed. The secretary shall then administer the following oath or affirmation to the President:

"*You solemnly swear, or affirm, that in all things appertaining to the trial of the impeachment of you will do impartial justice according to the constitution and laws of the United States.*"

12. And the President shall administer the said oath or affirmation to each senator present.

The secretary shall then give notice to the House of Representatives, that the Senate is ready to proceed upon the impeachment of in the Senate chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

13. Counsel for the parties shall be admitted to appear, and be heard upon an impeachment.

14. All motions made by the parties, or their counsel, shall be addressed to the President of the Senate, and if he shall require it, shall be committed to writing, and read at the secretary's table; and all decisions shall be had by ayes and noes, and without debate, which shall be entered on the records.

15. Witnesses shall be sworn in the following form, to wit: "You do swear, (or affirm, as the case may be) that the evidence you shall give in the case now depending between the United States, and shall be the truth, the whole truth, and nothing but the truth. So help you God." Which oath shall be administered by the secretary.

16. Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

17. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

18. If a Senator wishes a question to be put to a witness, it shall be reduced to writing and put by the President.

19. At all times, whilst the Senate is sitting upon the trial of an impeachment, the doors of the Senate chamber shall be kept open.

HIGH COURT OF IMPEACHMENTS.

WEDNESDAY, JANUARY 2d, 1805.

The court having been opened by proclamation,

The return made by the sergeant at arms was read, as follows:

"I James Mathers, sergeant at arms to the Senate of the United States, in obedience to the within summons to me directed, did proceed to the residence of the within named Samuel Chase, on the 12th day of December, 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him the said Samuel Chase.

JAMES MATHERS."

After which the secretary administered to him the oath as follows: "You James Mathers, sergeant at arms to the Senate of the United States, do solemnly swear, that the return made and subscribed by you, upon the process issued on the 10th day of December last, by the Senate of the United States, against Samuel Chase, one of the associate justices of the supreme court, is truly made, and that you have performed said services as therein described. So help you God."

SAMUEL CHASE, having been solemnly called, appeared.

[The President of the Senate (Mr. Burr) informed Mr. Chase, that having been summoned to answer to the articles of impeachment exhibited against him by the House of Representatives, the Senate were ready to receive any answer he had to make to them.]

Mr. Chase requested the indulgence of a chair,* which was immediately furnished.

After being seated for a short time, Mr. Chase rose, and commenced the following address to the Senate, which he read from a paper that he held in his hand.

"*Mr. President,*

"I appear, in obedience to a summons from this honorable court, to answer articles of impeachment exhibited against me, by the honorable the House of Representatives of the United States.

"To these articles, a copy of which was delivered to me with the summons, I say, that I have committed no crime or misdemeanor whatsoever, for which I am subject to impeachment according to the constitution of the United States. I deny, with a few exceptions, the acts with which I am charged; I shall contend, that all acts admitted to have been done by me, were *legal;* and I deny, in every instance, the *improper* intentions with which the acts charged, are alleged to have been done, and in which their supposed criminality altogether consists."

The *President* reminded Mr. Chase, that this was the day appointed to receive any answer he might make to the articles of impeachment.

Mr. *Chase* said his purpose was to request the allowance of further time to put in his answer.

The *President* desired him to proceed.

Mr. *Chase* proceeded in his address:

"But in charges of so heinous a nature, urged by so high an authority, a simple denial is not sufficient. It behoves me, for the legal justification of my conduct, and for the vindication of my character, to meet *each* charge with a full and particular answer; to explain and refute at length, every principle urged against me; to state the evidence by which I am to disprove every fact relied on in support of the accusation; and to detail all the facts and arguments on which my defence is to rest. The necessity of an answer embracing all these objects, in cases of impeachment, is obvious; and the right to make it, is secured by law and sanctioned by uniform practice.

"Such an answer it is my intention to make. It is my purpose to submit the *whole* ground of my defence to the view of this honorable

* *We understand, that in correspondence with the parliamentary practise of England, no chair was, previously to the introduction of Mr. Chase, assigned him; but that an informal intimation was made to him, that, on his requesting it, it would be allowed.*

court, of my country, of the world, and of those who are to conduct the prosecution. So will my judges come to the trial with that full knowledge of the whole matter in dispute, which is essential for enabling them to understand and apply the testimony and the arguments; and the honorable managers will be better prepared to refute such parts of my defence, as they may think untenable."

The *President* here interrupted Mr. Chase; and asked if the paper he was reading was intended for his answer; if so, it would be put on file. If it was the prelude to a motion he meant to make, praying to be allowed further time for putting in his answer, he would confine himself strictly to what had relation to that object. From the tenor of what had been urged it had appeared to him as intended for an answer to the articles of impeachment.

Mr. *Chase* said it was not his answer that he was reading; but that he was assigning reasons, why he could not now answer, in order to shew that he was intitled to further time to prepare and put in his answer.

President. You, who are so conversant in the practice of courts of law, know very well that a motion for time must not be founded on mere suggestions, but must be founded on some facts to prove the propriety of the motion.

Mr. *Chase* said he meant to shew the impracticability of his answering at this time, from the very articles themselves, and it was for that purpose he had made an allusion to them.

The *President* said, with the caution he had given, he might proceed, provided no objection were made by any gentleman of the Senate.

Mr. Chase proceeded in his address:

"But in a case of this kind, where the accusation embraces so great a variety of charges, of principles, and of facts, it is manifest, that preparing such an answer, as I have a right to make and as my duty to myself, my family, my friends and my country, requires at my hand, a considerable time must be necessary.

Many of the principles involved in this impeachment, are very important, not only to me, but to the liberties of every American citizen, and to the cause of free government in general. These principles ought to be maturely considered, and clearly explained. They present a wide field of legal investigation; many of them require laborious and extensive research, and although some of them have accompanied the prosecution from its commencement, and have thus been for a considerable time subjected to my consideration; some, on the other hand, have been very recently introduced.

"Of this description is the principle, whereon the 5th and 6th articles rest: relative to the extent in which the courts of the United States are to be governed, not only in their *decisions*, but in their *proceedings* by the state laws. A principle which was not brought into view until a few weeks ago, and the explanation of which will require a careful consideration, of the conduct and proceedings of the supreme and circuit courts of the United States, from the first establishment of our federal system.

"The same articles involve the construction of two state laws of Virginia, which I am charged with having infringed in the trial of Callender, which were not mentioned on the trial, or during any of the introductory proceedings, and of which I never heard until these articles were reported a few weeks ago. It is manifest that in order to fix the true construction of these laws, about which professional men have differed in opinion, recourse must be had to the decisions of the courts of that state, as explained by their records; or in case those records should be silent, to the recollection and opinion of professional men, accustomed to preside or attend in the courts where those laws are enforced. It is manifest that such an investigation cannot be accomplished in a short time.

"The facts on which this prosecution rests, except the last article, are alleged to have taken place more than four years ago; some of them at Philadelphia, some at Wilmington, in the state of Delaware, and some at Richmond, in Virginia. These facts are very numerous, and the greater part of them are of such a nature, as to depend for their criminality or innocence, on minute circumstances, or slight shades of testimony, and often on the different manner in which the same circumstances may affect different spectators, all equally disposed to represent truly what they observed. The most material facts are alleged to have happened in Richmond and Philadelphia. In the former of these places I am an utter stranger, having never been there but once; and in the latter, I know personally but very few individuals. These circumstances render it very difficult for me, to ascertain the persons who witnessed the various transactions in question, and are able, after this lapse of time, to give accurate testimony concerning them; and this difficulty is very much increased, by the distance of those places from that of my residence. I assure this honorable court, that from the moment when this prosecution assumed a serious appearance and a definitive form, at the last session of Congress, I have turned my attention to the subject of my defence, and my answer, and have exerted myself in finding out and procuring the requisite testimony; but the difficulties which I have stated, added to my ill state of health during a great part of the last year, have prevented me from making such progress, as to afford me the hope of being able to obtain the object in a very short time. I have done much, but much, very much, remains to be done, even in those parts of the prosecution where I had some notice by the proceedings of last session. In those very material parts which have originated during the present session, every thing is still to be done.

"It may perhaps be thought, that although these preparations might be necessary for the trial, they are not so for the answer. But such an opinion, I trust, would on examination be found erroneous.

"The answer, in cases of impeachment, must disclose the whole defence, and the defence must be confined to the matters stated in the answer. Otherwise the prosecutors might be surprised at the trial, by objections which with previous notice, it would be in their power to refute or explain. The accused, therefore, before he puts in his answer, ought to have time sufficient for making himself thoroughly master of

his defence, of the grounds on which it rests, and of the facts and evidence by which it is to be supported. He ought to be completely prepared for the trial; between which and the answer no delay need to take place, except such as may be necessary for convening the witnesses.

"In so material a part of his preparation for defence, as the drawing up of his answer, it will not, I presume, be denied that he ought to have an opportunity of obtaining the best *professional* assistance, which it may be in his power to procure. This assistance is rendered peculiarly necessary to me, by the very precarious state of my health; which affords me, at this season of the year especially, but short and uncertain intervals, of fitness for mental or bodily exertion. Should my answer be required in a short time, I have no reason to suppose, that I shall be able to obtain such assistance of this kind as I so much need, and as probably, I shall otherwise have in my power. Professional gentlemen, engaged extensively in business, are at all times too liable to interruption, and too much occupied to devote themselves exclusively to an affair of this nature, so as to complete it within a short period; and at this season of the year, they are for the most part particularly and indispensably engaged.

"These reasons in favor of a liberal allowance of time for preparing the answer, derive great additional force from one further consideration, which I hope that I may, without impropriety, present to the view of this honorable court. Reputation ought to be more dear to every man, and is more dear to me than the honors or the emoluments of office. In cases of impeachment, the facts which appear, the explanations which are given, and the arguments which are urged, at the trial, are sometimes wholly omitted in the statements given to the public, and often misrepresented, or stated too indistinctly to be generally understood. It is to the answer that the world must look for the justification of the accused. It is by his answer alone, that he can furnish a clear, concise and authentic explanation of his conduct and his motives, supported by such a statement of his proofs, as can be extensively read, clearly understood, and easily remembered. He may, therefore, claim from justice, and expect from the high dignity and responsible character of this honorable tribunal, such time for preparing this very important document, as may enable him to bestow on it all the care and labor which it requires, and to give it all the force of which it may be susceptible.

"In stating these considerations, Mr. President, in support of my request for a continuance of this case, I disclaim all intention of affected delay. Feeling a consciousness of my integrity, and a just pride of character, which place me far above the fear of events, I am anxious to meet this accusation, and I rejoice in an opportunity of refuting it. I know that my conduct, though liable to a full portion of human error, has at all times been free from intentional impropriety. I know that in all the instances selected as the grounds of accusation, I have discharged my official duties, with a sacred and inviolate regard to my oath, my character, the laws of my country, and the rights of my fellow citizens. I know that I can prove my innocence as to all the matters alleged against me. And acrimonious as are the terms in which many of

the accusations are conceived; harsh and opprobrious as are the epithets wherewith it has been thought proper to assail my name and character, by those who were '*puling in their nurse's arms*,' *whilst I was contributing my utmost aid to lay the ground-work of American liberty*; I yet thank my accusers, whose functions as members of the government of my country I highly respect, for having at length put their charges into a definitive form, susceptible of refutation; and for having thereby afforded me an opportunity of vindicating my innocence, in the face of this honorable court, of my country, and of the world."

On using the expressions marked in *italics*,

The *President* interrupted Mr. Chase, and said that observations of censure or recrimination were not admissible; it would be very improper for him to listen to observations on the statements of the House of Representatives before an answer was filed.

Mr. *Chase* said he had very few words more to add, which would conclude what he had to say at the present time.

With the permission of the President he proceeded:

"But this vindication, situated as I am, and as this case is, cannot be the work of a few weeks. Much time has been employed in preparing the accusation; less will be required for the defence; but a short time will not suffice. I am far from presuming to prescribe to this honorable court, whose sense of justice and disposition to grant every proper indulgence, I cannot doubt; but it may perhaps be not improper to suggest that by the first day of next session, the answer could be prepared and put in; and that the trial might then take place as soon afterwards, as the witnesses could be collected. I declare that it will be impossible for me to prepare my answer in such time as to commence the trial during this session with any prospect of bringing it to a close before the session must end; and were I to omit that full answer which I wish to give, it would be impossible for me, in the course of this session, (only two months of which now remain) to ascertain fully all the facts necessary for my defence; to find out and bring to this place, the witnesses and written testimony; or to make arrangements relative to that assistance of counsel which my case requires, my age and infirmities render essential, and a longer time would enable me to procure.

"I hope, Mr. President, I may be permitted to observe, that my *private* and *professional* reputation for probity and honor, has never been called in question. I have sustained a high judicial character for above sixteen years, and during the first six I presided at the trial of more criminals than any other judge within the United States. During this whole period of time my *official* conduct has never been arraigned, except only in the trials of Cooper, Fries, and Callender, above four years ago. For the truth of these assertions I appeal to all who know me; and particularly to the two honorable senators from Maryland.

"In respect to the present prosecution, I will make but one remark. That I am impeached for giving on the trial of Callender, several judicial opinions, in which judge Griffin, my associate, concurred; my opinions are held to be criminal, or that they flowed from partiality, and an intention to oppress Callender; but the *same* opinions given by my associate have been considered perfectly innocent.

"I have now only to solicit this honorable court to allow me until the first day of next session to put in my answer, and to prepare for my trial; and I submit myself as to the further proceedings in this case to the discretion of this honorable court, in whose integrity, impartiality and independence I repose the highest confidence. I will not for a moment believe that the spirit of party can ever enter and pollute these walls, or that popular prejudice or political motives will be harbored in the bosom of any member in this honorable body.

"On the contrary, I hope and expect, that all its decisions will be governed by the immutable principles of justice, and a sacred regard to the constitution and the law of the land, which every member of this court is bound by duty, and the obligations of a christian judge, to support and observe."

Mr. Chase, having finished his address, was desired by the President, if he had any motion to make, to reduce it to writing, and hand it to the secretary.

Whereupon, Mr. Chase submitted the following motion:

"I solicit this honorable court to allow me until the first day of the next session, to put in my answer, and to prepare for my trial."

The *President* informed Mr. Chase, that the court would take time to consider his motion.*

The Senate withdrew to a private apartment, where debate arose on the question, whether it was not incumbent on the Senators to take the oath required by the constitution, before they took into consideration the motion of Mr. Chase, which issued in the adoption of the following resolution:

Resolved, That on the meeting of the Senate, to-morrow, before they proceed to any business on the articles of impeachment before them, and before any decision of any question, the oath prescribed by the rules, shall be administered to the President and members of the Senate.

On the ensuing day, previously to the entrance of the Senate into the public room, considerable debate took place on the motion of Mr. Chase, without any decision being made.

THURSDAY, JANUARY 3d, 1805.

The court was opened by proclamation about 2 o'clock.

The oath prescribed was administered to the President by the secretary.

The President administered the oath prescribed to the following members:

Messrs. Adams, Anderson, Baldwin, Bradley, Breckenridge, Brown, Condit, Dayton, Ellery, Franklin, Giles, Hillhouse, Howland, Jackson, Mitchill, Moore, Olcott, Pickering, Smith, *(of Maryland,)* Smith, *(of New York,)* Smith, *(of Ohio,)* Smith, *(of Vermont,)* Sumter, Tracy, White, Worthington, Wright.

* *During these proceedings, neither the Managers, or House of Representatives were present.*

And the affirmation was administered to Messrs. Logan, Maclay, and Plumer.

The President stated that he had received a letter from the defendant, enclosing an affidavit that further time was necessary for him to prepare for trial; which affidavit was read, as follows:

City of Washington, ss.

Samuel Chase made oath on the holy evangels of Almighty God, that it is not in his power to obtain information respecting the facts alleged in the articles of impeachment to have taken place in the city of Philadelphia, in the trial of John Fries; or of the facts alleged to have taken place in the city of Richmond, in the trial of James T. Callender, in time to prepare and put in his answer, and to proceed to trial, with any probability that the same could be finished on or before the fifth day of March next. And further, that it is not in his power to procure information of the names of the witnesses, whom he thinks it may be proper and necessary for him to summon, in time to obtain their attendance, if his answer could be prepared in time sufficient for the finishing of the said trial, before the said fifth day of March next: and the said Samuel Chase further made oath, that he believes it will not be in his power to obtain the advice of counsel, to prepare his answer, and to give him their assistance on the trial, which he thinks necessary, if the said trial should take place during the present session of Congress; and that he verily believes, if he had at this time, full information of facts, and of the witnesses proper for him to summon, and if he had also the assistance of counsel, that he could not prepare the answer he thinks he ought to put in, and be ready for his trial, within the space of four or five weeks from this time. And further, that his application to the honorable the Senate, for time to obtain information of facts, in order to prepare his answer, and for time to procure the attendance of necessary witnesses, and to prepare for his defence in the trial, and to obtain the advice and assistance of counsel, is not made for the purpose of delay, but only for the purpose of obtaining a full hearing of the articles of impeachment against him, in their real merits.

SAMUEL CHASE.

Sworn to this third day of January, 1805, before

SAMUEL HAMILTON.

Whereupon, The following motion was made by Mr. Bradley:

Ordered, That Samuel Chase file his answer, with the secretary of the Senate, to the several articles of impeachment exhibited against him, by the House of Representatives, on or before the day of

A motion was made by Mr. Giles to amend the motion, and to strike out all that follows the word "*Ordered*," and insert "That next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase."

Mr. Hillhouse called for a division of the question. And the yeas and nays being taken on striking out, it passed in the affirmative, yeas 20, nays 10.

Those who voted in the affirmative, are,

Messrs. Anderson, Baldwin, Breckenridge, Brown, Condit, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Mitchill, Moore, Smith, *(of Maryland,)* Smith, *(of New York,)* Smith, *(of Ohio,)* Smith, *(of Vermont,)* Sumter, Worthington.

Those who voted in the negative, are,

Messrs. Adams, Bradley, Dayton, Hillhouse, Olcott, Pickering, Plumer, Tracy, White, Wright.

On motion, to insert the amendment proposed, the yeas and nays being taken, it passed in the affirmative, yeas 22, nays 8.

Those who voted in the affirmative, are,

Messrs. Anderson, Baldwin, Bradley, Breckenridge, Brown, Condit, Dayton, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Mitchill, Moore, Smith, *(of Maryland,)* Smith, *(of New York,)* Smith, *(of Ohio,)* Smith, *(of Vermont,)* Sumter, Worthington.

Those who voted in the negative, are,

Messrs. Adams, Hillhouse, Olcott, Pickering, Plumer, Tracy, White, Wright.

On motion, by Mr. Tracy, to fill the blank with the words "the first Monday of December next," the yeas and nays being taken, it passed in the negative, yeas 12, nays 18.

Those who voted in the affirmative, are,

Messrs. Bradley, Dayton, Hillhouse, Logan, Olcott, Pickering, Plumer, Smith, *(of Maryland,)* Smith, *(of Ohio,)* Smith, *(of Vermont,)* Tracy, White,

Those who voted in the negative, are,

Messrs. Adams, Anderson, Baldwin, Breckenridge, Brown, Condit, Ellery, Franklin, Giles, Howland, Jackson, Maclay, Mitchill, Moore, Smith, *(of New York,)* Sumter, Worthington, Wright.

On motion, by Mr. Breckenridge, to fill the blank with the words "the fourth day of February next," the yeas and nays being taken, it passed in the affirmative, yeas 22, nays 8.

Those who voted in the affirmative, are,

Messrs. Adams, Anderson, Baldwin, Breckenridge, Brown, Condit, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Mitchill, Moore, Smith, *(of Maryland,)* Smith, *(of New-York,)* Smith, *(of Ohio,)* Smith, *(of Vermont,)* Sumter, Worthington, Wright.

Those who voted in the negative, are,

Messrs. Bradley, Dayton, Hillhouse, Olcott, Pickering, Plumer, Tracy, White.

On motion, to agree to the order, as amended, the yeas and nays being taken, it passed in the affirmative, yeas 21, nays 9.

Those who voted in the affirmative, are,

Messrs. Anderson, Baldwin, Breckenridge, Brown, Condit, Ellery, Franklin, Giles, Howland, Jackson, Logan, Maclay, Mitchell, Moore, Smith, *(of Maryland,)* Smith, *(of New-York,)* Smith, *(of Ohio,)* Smith, *(of Vermont,)* Sumter, Worthington, Wright.

Those who voted in the negative, are,

Messrs. Adams, Bradley, Dayton, Hillhouse, Olcott, Pickering, Plumer, Tracy, White.

So it was

Ordered, That the fourth day of February next, shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase.

Ordered, That the secretary notify the House of Representatives, and Samuel Chase thereof.

Between this day, and that assigned for receiving the answer of Mr. Chase, the Senate chamber was fitted up in a style of appropriate elegance. Benches, covered with crimson, on each side, and in a line with the chair of the President, were assigned to the members of the Senate. On the right and in front of the chair, a box was assigned to

the Managers, and on the left a similar box to Mr. Chase, and his counsel, and chairs allotted to such friends as he might introduce. The residue of the floor was occupied with chairs for the accommodation of the members of the House of Representatives; and with boxes for the reception of the foreign ministers, and civil and military officers of the United States. On the right and left of the chair, at the termination of the benches of the members of the court, boxes were assigned to stenographers. The permanent gallery was allotted to the indiscriminate admission of spectators. Below this gallery, and above the floor of the House, a new gallery was raised, and fitted up with peculiar elegance, intended primarily for the exclusive accommodation of ladies. But this feature of the arrangement made by the Vice-President, was at an early period of the trial abandoned, it having been found impracticable to separate the sexes! At the termination of this gallery, on each side, boxes were specially assigned to ladies attached to the families of public characters. The preservation of order was devolved on the marshal of the district of Columbia, who was assisted by a number of deputies.

TRIAL

OF

SAMUEL CHASE.

MONDAY, FEBRUARY 4th, 1805.

ABOUT a quarter before ten o'clock the court was opened by proclamation; all the members of the Senate, thirty four, attending.

The chamber of the Senate, which is very extensive, was soon filled with spectators, a large portion of whom consisted of ladies, who continued, with little intermission, to attend during the whole course of the trial.

The oath prescribed was administered to Mr. Bayard, Mr. Cocke, Mr. Gaillard, and Mr. Stone, members of the court, who were not present when it was before administered.

Ordered, that the secretary give notice to the House of Representatives, that the Senate are in their public chamber, and are ready to proceed on the trial of Samuel Chase; and that seats are provided for the accommodation of the members.

In a few minutes the managers, viz: Messrs. J. Randolph, Rodney, Nicholson, Boyle, Early, G. W. Campbell, and Clarke, accompanied by the House of Representatives in committee of the whole, entered and took their seats.

Samuel Chase being called to make answer to the articles of impeachment, exhibited against him by the House of Representatives, appeared, attended by Messrs. Harper, Martin, and Hopkinson, his counsel; to whom seats were assigned.

The President, after stating to Mr. Chase the indulgence of time which had been allowed, enquired if he were prepared to give in his answer.

Mr. Chase said, he had prepared it, as well as circumstances would permit: and submitted the following motion:

"Samuel Chase moves for permission to read his answer, by himself and his counsel, at the bar of this honorable court."

The President asked him if it was the answer on which he meant to rely? to which he replied in the affirmative.

The motion being agreed to by a vote of the Senate, Mr. Chase commenced the reading of his answer, (in which he was assisted by Messrs. Harper, and Hopkinson,) as follows:

THIS respondent, in his proper person, comes into the said court, and protesting that there is no high crime or misdemeanor particularly alleged in the said articles of impeachment, to which he is, or can be bound by law to make answer; and saving to himself now, and at all times hereafter, all benefit of exception to the insufficiency of the said articles, and each of them, and to the defects therein appearing in point of law, or otherwise; and protesting also, that he ought not to be injured in any manner, by any words, or by any want of form in this his answer; he submits the following facts and observations by way of answer to the said articles.

The first article relates to his supposed misconduct in the trial of John Fries, for treason, before the circuit court of the United States, at Philadelphia, in April and May, 1800; and alleges that he presided at that trial, and that "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, faithfully and impartially, and without respect to persons," he did then, "in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust."

This general accusation, too vague in itself for reply, is supported by three specific charges of misconduct:

1st. "In delivering an opinion, in writing, on the question of law, on the construction of which, the defence of the accused materially depended:" which opinion, it is alleged, tended to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his favor."

2d. "In restricting the counsel for the said John Fries, from recurring to such English authorities, as they believed apposite; or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client."

3d. "In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give."

This first article then concludes, that in consequence of this irregular conduct of this respondent, "the said John Fries was deprived of the right, secured to him by the *eighth* article, amendatory of the constitution; and was condemned to death, without having been heard, by counsel, in his defence."

By the eighth article amendatory to the constitution, this respondent supposes, is meant the *sixth* amendment to the constitution of the United States; which secures to the accused, in all criminal prosecutions, the right to have the assistance of counsel for his defence.

In answer to these three charges, the respondent admits that the circuit court of the United States, for the district of Pennsylvania, was held at Philadelphia, in that district, in the months of April and May, in the year of our Lord, one thousand eight hundred; at which court John Fries, the person named in the said first article, was brought to trial, on an indictment for treason against the United States; and that this respondent then held a commission, as one of the associate justices of the supreme court of the United States; by virtue of which office, he did, pursuant to the laws of the United States, preside at the above mentioned trial, and was assisted therein by Richard Peters, esq. then, and still district judge of the United States, for the district of Pennsylvania; who, as directed by the laws of the United States, sat as assistant judge at the said trial.

With respect to the opinion, which is alleged to have been delivered by this respondent, at the above-mentioned trial, he begs leave to lay before this honorable court, the true state of that transaction, and to call its attention to some facts and considerations, by which his conduct on that subject will, he presumes, be fully justified.

The constitution of the United States, in the third section of the third article, declares that "treason against the United States, shall consist *only in levying war against them*, or in adhering to their enemies, giving them aid and comfort."

By two acts of Congress, the first passed on the third day of March, 1791, and the second on the eighth day of May, 1792, a duty was imposed on spirits distilled within the United States, and on stills; and various provisions were made for its collection.

In the year 1794, an insurrection took place in four of the western counties of Pennsylvania, with a view of resisting, and preventing by force the execution of these two statutes; and at a circuit court of the United States, held at Philadelphia, for the district of Pennsylvania, in the month of April, in the year 1795, by William Patterson, esq. then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters, then district judge of the United States, for the district of Pennsylvania, two persons, who had been concerned in the above named insurrection, namely, Philip Vigol and John Mitchel, were indicted for treason, of levying war against the United States, by resisting and preventing by force the execution of the two last mentioned acts of Congress; and were, after a full and very solemn trial, convicted on the indictments and sentenced to death. They were afterwards pardoned by George Washington, then President of the United States.

In the first of these trials, that of Vigol, the defence of the prisoner was conducted by very able counsel, one of whom, William Lewis, esq. is the same person who

appeared as counsel for John Fries, in the trial now under consideration. Neither that learned gentleman, nor his able colleague, then thought proper to raise the question of law, "whether resisting and preventing by armed force, the execution of a *particular* law of the United States, be a 'levying of war against the United States," according to the true meaning of the constitution? although a decision of this question in the negative, must have acquitted the prisoner. But in the next trial, that of Mitchell, this question was raised on the part of the prisoner, and was very fully and ably discussed by his counsel; and it was solemnly determined by the court, both the judges concurring, "that to resist or prevent by armed force, the execution of a particular law of the United States, is a levying of war against the United States, and consequently is treason, within the true meaning of the constitution." The decision, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, although not absolutely obligatory, ought to be viewed with very great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.

On the 9th of July, 1798, an act of Congress was passed, providing for a valuation of lands and dwelling houses, and an enumeration of slaves throughout the United States; and directing the appointment of commissioners and assessors for carrying it into execution: And on the 4th day of July, in the same year, a direct tax was laid by another act of Congress of that date, on the lands, dwelling houses, and slaves, so to be valued and enumerated.

In the months of February and March, A. D. 1799, an insurrection took place in the counties of Bucks and Northampton, in the state of Pennsylvania, for the purpose of resisting and preventing by force, the execution of the two last mentioned acts of Congress, and

particularly that for the valuation of lands and dwelling houses. John Fries, the person mentioned in the article of impeachment now under consideration, was apprehended and committed to prison, as one of the ringleaders of this insurrection; and at a circuit court of the United States, held at Philadelphia, in and for the district of Pennsylvania, in the month of April, A. D. 1799, he was brought to trial for this offence, on an indictment for treason, by levying war against the United States, before James Iredell, esq. then one of the associate justices of the supreme court of the United States, who presided in the said court, according to law, and the above mentioned Richard Peters, then district judge of the United States, for the district of Pennsylvania, who sat in the said circuit court as assistant judge.

In this trial, which was conducted with great solemnity, and occupied nine days, the prisoner was assisted by Wm. Lewis and Alexander James Dallas, esqs. two very able and eminent counsellors; the former of whom, Wm. Lewis, is the person who assisted as above mentioned, in conducting the defence of Vigol, on a similar indictment. These gentlemen, finding that the facts alleged were fully and undeniably proved, by a very minute and elaborate examination of witnesses, thought proper to rest the case of the prisoner, on the question of law which had been determined in the cases of Vigol and Mitchel above mentioned, and had then been acquiesced in, but which they thought proper again to raise. They contended, "that to resist by force of arms a particular law of the United States, does not amount to levying war against the United States, within the true meaning of the constitution, and therefore it is not *treason*, but a *riot* only." This question they argued at great length, and with all the force of their learning and genius; and after a very full discussion at the bar, and the most mature deliberation by the court, the learned and excellent judge who then presided, and who was no less distinguished by his humanity and

tenderness towards persons tried before him, than by his extensive knowledge and great talents as a lawyer, pronounced the opinion of himself and his colleague, "that to resist or prevent by force, the execution of a particular law of the United States, does amount to levying war against them, within the true meaning of the constitution, and does therefore constitute the crime of treason:" thereby adding the weight of another and more solemn decision, to the precedent which had been established in the above mentioned cases of Vigol and Mitchel.

Under this opinion of the court on the question of law, the jury, having no doubt as to the facts, found the said John Fries guilty of treason, on the above mentioned indictment. But a new trial was granted by the court, not by reason of any doubt as to the correctness of the decision on the question of law, but solely on the ground, as this respondent hath understood and believes, that one of the jurors of the petit jury, after he was summoned, but before he was sworn on the trial, had made some declaration unfavorable to the prisoner.

The yellow fever having appeared in Philadelphia in the summer of the year 1799, the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania, did according to law appoint the next circuit court of that district, to be held at Norris town therein: Pursuant to which appointment, a circuit court was held at Norris town aforesaid, in and for the said district, on the 11th day of October, in the last mentioned year, before Bushrod Washington, esq. then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters; at which court no proceedings were had on the aforesaid indictment against John Fries, because, as this respondent hath been informed and believes, the commission of the marshal of the said district had expired, before he summoned the jurors to attend at the said court, and

had not been renewed; by reason of which no legal pannel of jurors could be formed.

On the 11th day of April, A. D. 1800, and from that day until the 2d day of May in the same year, a circuit court of the United States was held at Philadelphia, in and for the district of Pennsylvania, before this respondent, then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania. At this court, the indictment on which the said John Fries had been convicted as above mentioned, was quashed ex officio by William Rawle, esq. then attorney of the United States for the district of Pennsylvania, and a new indictment was by him preferred against the said John Fries, for treason of levying war against the United States, by resisting and preventing by force, in the manner above set forth, the execution of the above mentioned acts of Congress, for the valuation of lands and dwelling houses and the enumeration of slaves, and for levying and collecting a direct tax. This indictment, of which a true copy, marked exhibit No. 1, is herewith exhibited by this respondent, who prays that it may be taken as part of this his answer, being found by the grand jury on the 16th day of April, 1800, the said John Fries was on the same day arraigned thereon, and plead not guilty. William Lewis and Alexander James Dallas, esqrs. the same persons who had conducted his defence at his former trial, were again at his request assigned by the court as his counsel; and his trial was appointed to be had, on Tuesday the 22d day of the last mentioned month of April.

After this indictment was found by the grand jury, this respondent considered it with great care and deliberation, and finding from the three overt acts of treason which it charged, that the question of law arising upon it, was the same question which had already been decided twice in the same court, on so-

lemn argument and deliberation, and once in that very case, he considered the law as settled by those decisions, with the correctness of which on full consideration he was entirely satisfied; and by the authority of which he should have deemed himself bound, even had he regarded the question as doubtful in itself. They are moreover in perfect conformity with the uniform tenor of decisions in the courts of England and Great Britain, from the revolution, in 1688, to the present time, which, in his opinion, added greatly to their weight and authority.

And surely he need not urge to this honorable court, the correctness, the importance, and the absolute necessity of adhering to principles of law once established, and of considering the law as finally settled, after repeated and solemn decisions by courts of competent jurisdiction. A contrary principle would unsettle the basis of our whole system of jurisprudence, hitherto our safeguard and our boast; would reduce the law of the land, and subject the rights of the citizen, to the arbitrary will, the passions, or the caprice of the judge in each particular case; and would substitute the varying opinions of various men, instead of that fixed, permanent rule, in which the very essence of law consists. If this respondent erred in regarding this point as settled, by the repeated and solemn adjudications of his predecessors, in the same court and in the same case; if he erred in supposing, that a principle established by two solemn decisions, was obligatory upon him, sitting in the same court where those decisions had been made; if he erred in believing that it would be the highest presumption in him, to set up his opinion and judgment over that of his colleague, who had twice decided the same question, and of two of his predecessors, who justly rank among the ablest judges that have ever adorned a court; if in all this he erred, it is an error of which he cannot be ashamed, and which he trusts will not be deemed criminal in the eyes of this honorable court,

of his country; or of that posterity by which he, his accusers, and his judges, must one day be judged.

Under the influence of these considerations, this respondent drew up an opinion on the law, arising from the overt acts stated in the said indictment, which was conformable to the decisions before given as above mentioned, and which he sent to his colleague the said Richard Peters, for his consideration. That gentleman returned it to this respondent, with some amendments affecting the form only, but not in any manner touching the substance.

The opinion thus agreed to, this respondent thought it proper to communicate to the prisoner's counsel.... several reasons concurred in favor of this communication.

In the first place, this respondent considered himself and the court, as bound by the authority of the former decisions; especially the last of them, which was on the same case. He considered the law as settled, and had every reason to believe that his colleague viewed it in the same light. It was not suggested or understood, that any new evidence was to be offered; and he knew that if any should be offered, which could vary the case, it would render wholly inapplicable both the opinion and the former decisions on which it was founded. And he could not and did not suppose, that the prisoner's counsel would be desirous of wasting very precious time, in addressing to the court an useless argument, on a point which that court held itself precluded from deciding in their favor. He therefore conceived that it would be rendering the counsel a service and a favor, to apprise them before hand of the view which the court had taken of the subject; so as to let them see in time, the necessity of endeavoring to produce new testimony, which might vary the case, and take it out of the authority of former decisions.

Secondly, There were more than one hundred civil causes then depending in the said court, as appears

by the exhibit marked No. 1, which this respondent prays may be taken as part of this, his answer. Many of those causes had already been subjected to great delay, and it was the peculiar duty of this respondent, as presiding judge, to take care, that as little time as possible should be unnecessarily consumed, and that every convenient and proper dispatch should be given to the business of the citizens. He did believe, that an early communication of the court's opinion, might tend to the saving of time, and consequently to the dispatch of business.

Thirdly, As the court held itself bound by the former decisions, and could not therefore alter its opinion in consequence of any argument; and as it was the duty of the court to charge the jury on the law, in all cases submitted to their consideration, he knew that this opinion must not only be made known at some period or other of the trial, but must at the end of the trial be expressly delivered to the jury by him, in a charge from the bench: and he could not suppose and cannot yet imagine, that an opinion, which was to be thus solemnly given in charge to the jury, at the close of the trial, could make any additional impression on their minds, from the circumstance of its being intimated to the counsel before the trial began, in the hearing of those who might be afterwards sworn on the jury.

And, lastly, it was then his opinion, and still is, that it is the duty of every court of this country, and was his duty on the trial now under consideration, to guard the jury against erroneous impressions respecting the laws of the land. He well knows, that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries, to decide on the law as well as on the facts, in all criminal cases. This power he holds to be a sacred part of our legal privileges, which he never has attempted, and never will attempt to abridge or to

obstruct. But he also knows, that in the exercise of this power, it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from the court, all the assistance which it can give, for rightly understanding the law. To withhold this assistance, in any manner whatever; to forbear to give it in that way, which may be most effectual for preserving the jury from error and mistake; would be an abandonment or forgetfulness of duty, which no judge could justify to his conscience or to the laws. In this case, therefore, where the question of law arising on the indictment, had been finally settled by authoritative decisions, it was the duty of the court, and especially of this respondent as presiding judge, early to apprise the counsel and the jury of these decisions, and their effect, so as to save the former from the danger of making an improper attempt, to mislead the jury in a matter of law, and the jury from having their minds preoccupied by erroneous impressions.

It was for these reasons, that on the 22d day of April, 1800, when the said John Fries was brought into court, and placed in the prisoners' box for trial, but before the petit jury was impannelled to try him, this respondent informed the abovementioned William Lewis, one of his counsel, the aforesaid Alexander James Dallas not being then in court, "that the court had deliberately considered the indictment against John Fries for treason, and the three several overt acts of treason stated therein: That the crime of treason was defined by the constitution of the United States: That the federal legislature had the power to make, alter, or repeal laws, so the judiciary only had the power, and it was their duty, to declare, expound and interpret the constitution and laws of the United States: That it was the duty of the court, in all criminal cases, to state to the petit jury, their opinion of the law arising on the facts; but the petit jury, in all criminal cases, were to decide both the law and the facts, on a consideration

of the whole case: That there must be some constructive exposition of the terms used in the constitution, "levying war against the United States:" That the question, what acts amounted to levying war against the United States, or the government thereof, was a question of law, and had been decided by judges Patterson and Peters, in the cases of Vigol and Mitchel, and by judges Iredell and Peters, in the case of John Fries, prisoner at the bar, in April 1799: That judge Peters remained of the same opinion, which he had twice before delivered, and he, this respondent, on long and great consideration, concurred in the opinion of judges Patterson, Iredell, and Peters: That to prevent unnecessary delay, and to save time on the trial of John Fries, and to prevent a delay of justice, in the great number of civil causes depending for trial at that term, the court had drawn up in writing, their opinion of the law, arising on the overt acts, stated in the indictment against John Fries; and had directed David Caldwell their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the district, one to the counsel for the prisoner, and one to the petit jury, after they should have been impannelled and heard the indictment read to them by the clerk, and after the district attorney should have stated to them the law on the overt acts alleged in the indictment, as it appeared to him."

After these observations, this respondent delivered one of the abovementioned copies to the aforesaid William Lewis, then attending as one of the prisoner's counsel; who read part of it, and then laid it down on the table before him. Some observations were then made on the subject, by him and the abovementioned Alexander James Dallas, who had then come into court; but this respondent doth not now recollect those observations, and cannot undertake to state them accurately.

And this respondent further saith, that the paper marked exhibit No. 2, and herewith exhibited, which

he prays leave to make part of this his answer, is a true copy of the original opinion, drawn up by him and concurred in by the said Richard Peters, as above set forth, which original opinion is now in the possession of this respondent, ready to be produced to this honorable court. He may have erred in forming this opinion, and in the time and manner of making it known to the counsel for the prisoner. If he erred in forming it, he erred in common with his colleague and with two of his predecessors; and he presumes to hope that an error which has never been deemed criminal in them, will not be imputed as a crime to him, who was led into it by their example and their authority. If he erred in the time and manner of making known this opinion, he feels a just confidence, that when the reasons which he has alleged for his conduct, and by which it seemed to him to be fully justified, shall come to be carefully weighed, they will be sufficient to prove, if not that this conduct was perfectly regular and correct, yet that he might sincerely have considered it as right; and that in a case where so much doubt may exist, to have committed a mistake, is not to have committed a crime.

And this respondent further answering insists, that the opinion thus delivered to the prisoner's counsel, viz: that "any insurrection or rising of any body of people within the United States, for the purpose of resisting or preventing by force or violence, under any pretence whatever, the execution of any statute of the United States, for levying or collecting taxes, or for any other object of a general or national concern, is levying war against the United States, within the contemplation and true meaning of the constitution of the United States," is a legal and correct opinion, supported not only by the two previous decisions abovementioned, but also by the plainest principles of law and reason, and by the uniform tenor of legal adjudications in England and Great Britain, from the revolution in 1688, to this time. It ever

was, and now is his opinion, that the peace and safety of the national federal government, must be endangered, by any other construction of the terms "levying war against the United States," used by the federal constitution; and he is confident that no judge of the federal government, no judge of a superior state court, nor any gentleman of established reputation for legal knowledge, would or could deliberately give a contrary opinion.

If, however, this opinion were erroneous, this respondent would be far less censurable than his predecessors, by whose example he was led astray, and by whose authority he considered himself bound. Was it an error to consider himself bound by the authority of their previous decisions? If it were, he was led into the error by the uniform course of judicial proceedings, in this country and in England, and is supported in it, by one of the fundamental principles of our jurisprudence. Can such an error be a crime or misdemeanor?

If, on the other hand, the opinion be in itself correct, as he believes and insists that it is, could the expression of a correct opinion on the law, wherever and however made, mislead the jury, infringe their rights, or give an improper bias to their judgments? Could truth excite improper prejudice? Could the jury be less prepared to hear the law discussed, and to decide on it correctly, because it was correctly stated to them by the court? And is not that a new kind of offence, in this country at least, which consists in telling the truth, and giving a correct exposition of the law.

As to the second specific charge adduced in support of the first article of impeachment, which accuses this respondent, "of restricting the counsel for the said Fries, from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to

rest the defence of their client," this respondent admits that he did, on the above mentioned trial, express it as his opinion to the aforesaid counsel for the prisoner, "that the decisions in England, in cases of indictments for treason at common law, against the person of the king, ought not to be read to the jury, on trials for treason under the constitution and statutes of the United States; because such decisions could not inform, but might mislead and deceive the jury: that any decisions on cases of treason, in the courts of England, before the revolution of 1688, ought to have very little influence in the courts of the United States; that he would permit decisions in the courts of England or of Great Britain, since the said revolution, to be read to the court or jury, for the purpose of shewing what acts have been considered by those courts, as a constructive levying of war against the king of that country, in his regal capacity, but not against his person; because levying war against *his government*, was of the same nature as levying war against *the government of the United States:* but that such decisions, nevertheless, were not to be considered as authorities binding on the courts and juries of this country, but merely in the light of opinions entitled to great respect, as having been delivered after full consideration, by men of great legal learning and ability.

These are the opinions which he did, on that occasion, deliver to the counsel for the prisoner, and which he then thought, and still thinks, it was his duty to deliver. The counsellors admitted to practice in any court of justice are, in his opinion, and according to universal practice, to be considered as officers of such courts, and ministers of justice therein, and as such subject to the direction and control of the court, as to their conduct in its presence, and in conducting the defence of criminals on trial before it.—As counsel, they owe to the person accused, diligence, fidelity, and secrecy, and to the court and jury, due and correct information, according to the best of their knowledge and

ability, on every matter of law which they attempt to adduce in argument. The court, on the other hand, hath power, and is bound in duty, to decide and direct what evidence, whether by record or by precedents of decisions in courts of justice, is proper to be admitted for the establishment of any matter of law or fact. Consequently, should counsel attempt to read to a jury, as a law still in force, a statute which had been repealed, or a decision which had been reversed, or the judgments of courts in counties whose laws have no connection with ours, it would be the duty of the court to interpose, and prevent such an imposition from being practised on the jury. For these reasons, this respondent thinks that his conduct was correct, in expressing to the counsel for Fries, the opinions stated above. He is not bound to answer here for the correctness of those principles, though he thinks them incontestible; but merely for the correctness of his motives in delivering them. A contrary opinion would convert this honorable court, from a court of impeachment into a court of appeals; and would lead directly to the strange absurdity, that whenever the judgment of an inferior court should be reversed on appeal or writ of error, the judges of that court must be convicted of high crimes and misdemeanors, and turned out of office: that error in judgment is a punishable offence, and that crimes may be committed without any criminal intention. Against a doctrine so absurd and mischievous, so contrary to every notion of justice hitherto entertained, so utterly subversive of all that part of our system of jurisprudence, which has been wisely and humanely established for the protection of innocence, this respondent deems it his duty now, and on every fit occasion, to enter his protest and lift up his voice; and he trusts that in the discharge of this duty, infinitely more important to his country than to himself, he shall find approbation and support in the heart of every American, of every man throughout the world, who knows the

blessings of civil liberty, or respects the principles of universal justice.

It is only then, for the correctness of his motives in delivering these opinions, that he can now be called to answer; and this correctness ought to be presumed, unless the contrary appear by some direct proof, or by some violent presumption, arising from his general conduct on the trial, or from the glaring impropriety of the opinion itself. For he admits that cases may be supposed, of an opinion delivered by a judge, so palpably erroneous, unjust and oppressive, as to preclude the possibility of its having proceeded from ignorance or mistake.

Do the opinions now under consideration bear any of these marks? This honorable court need not be informed that there has existed in England, no such thing as treason at common law, since the year 1350, when the statute of the 25th Edward III, chap. 2, declaring what alone should in future be judged treason, was passed. Is it perfectly clear that decisions made before that statute, 450 years ago, when England, together with the rest of Europe, was still wrapped in the deepest gloom of ignorance and barbarism; when the system of English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when, under an able and vigorous monarch, every thing was adjudged to be treason which he thought fit to call so, and under a weak one, nothing was considered as treason which turbulent, powerful, and rebellious nobles thought fit to perpetrate: is it perfectly clear that decisions, made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? Is it perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1668, by which alone the balance of the English constitution was adjusted, and the English

liberties were fixt on a firm basis; decisions made either during the furious civil wars, in which two rival families contended for the crown; when in the vicissitudes of war, death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praise-worthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able and arbitrary monarchs, who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood, on one hand, and arbitrary power, insinuating itself under the forms of the constitution, on the other; struggles which presented at some times the wildest anarchy, at others, the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne: Is it clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? Is it clear that such English decisions on the subject of treason, as are applicable to our constitution and laws, are to be received in our courts, not merely as the opinions of learned and able men, which may enlighten their judgment, but as authorities which ought to govern absolutely their decisions? Is all this so clear, that a judge could not honestly and sincerely have thought the contrary? That he could not have expressed an opinion to the contrary, without corrupt or improper motives? If it be not thus clear, then must it be admitted that this respondent, sincerely and honestly, and in the best of his judgment, considered these de-

cisions as wholly inadmissible, or admissible only for the purposes and to the extent which he pointed out.

And if he did so consider them, was it not his duty to prevent them from being read to the jury, except under those restrictions, and for those purposes? Would his duty permit him to sit silently, and see the jury imposed on and misled? To sit silently and hear a book read to them as containing the law, which he knew did not contain the law? Such silence would have rendered him a party to the deception, and would have justly subjected him to all the contumely, which a conscientious and courageous discharge of his duty, has so unmeritedly brought on his name.

With respect to the statutes of the United States, which he is charged with having prevented the prisoner's counsel from citing on the aforesaid trial, he denies that he prevented any act of Congress from being cited, either to the court or jury, on the said trial; or declared at any time, that he would not permit the prisoner's counsel to read to the jury, or to the court, any act of Congress whatever. Nor does he remember or believe, that he expressed on the said trial, any disapprobation of the conduct of the circuit court before whom the said case was first tried, in permitting the act of Congress relating to crimes less than treason, commonly called the *sedition act*, to be read to the jury. He admits indeed that he was then and still is of opinion, that the said act of Congress was wholly irrelevant to the issue, in the trial of John Fries, and therefore ought not to have been read to the jury, or regarded by them. This opinion may be erroneous, but he trusts that the following reasons on which it was founded, will be considered by this honorable court, as sufficiently strong to render it possible, and even probable, that such an opinion might be sincerely held and honestly expressed: 1st, That Congress did not intend by the sedition law, to define the crime of treason by "levying war." Treason and sedition are crimes very distinct in their na-

ture, and subject to very different punishments; the former by death, and the latter by fine and imprisonment. 2dly, The sedition law makes a combination or conspiracy, with intent to impede the operation of any law of the United States, or the advising or attempting to procure any insurrection or riot, a high misdemeanor punishable by fine and imprisonment; but a combination or conspiracy with intent to prevent the execution of a law, or with intent to raise an insurrection for that purpose, or even with intent to commit treason, is not treason by "levying war" against the United States, unless it be followed by an attempt to carry such combination or conspiracy into effect, by actual force or violence. 3dly, The constitution of the United States is the fundamental and supreme law, and having defined the crime of treason, Congress could not give any legislative interpretation or exposition of that crime, or of the part of the constitution by which it is defined. 4thly, The judicial authority of the United States, is alone vested with power to expound their constitution and laws.

And this respondent further answering saith, that after the above mentioned proceedings had taken place in the said trial, it was postponed until the next day, Wednesday, April 23d, 1800; when at the meeting of the court, this respondent told both the above mentioned counsel for the prisoner, "that to prevent any misunderstanding of any thing that had passed the day before, he would inform them, that although the court retained the same opinion of the law, arising on the overt acts charged in the indictment against Fries, yet the counsel would be permitted to offer arguments to the court, for the purpose of shewing them that they were mistaken in the law; and that the court, if satisfied that they had erred in opinion, would correct it: and also that the counsel would be permitted to argue before the petit jury, that the court were mistaken in the law." And this respondent added, that the court had given no opinion as to the facts in the

case, about which both the counsel had declared that there would be no controversy.

After some observations by the said William Lewis and Alexander James Dallas, they both declared to the court, "that they did not any longer consider themselves as the counsel for John Fries the prisoner." This respondent then asked the said John Fries, whether he wished the court to appoint other counsel for his defence? He refused to have other counsel assigned; in which he acted, as this respondent believes and charges, by the advice of the said William Lewis and Alexander James Dallas: whereupon the court ordered the said trial to be had on the next day, Thursday, the 24th of April, 1800.

On that day the trial was proceeded in; and before the jurors were sworn, they were, by the direction of the court, severally asked on oath, whether they were in any way related to the prisoner, and whether they had ever formed or delivered any opinion as to his guilt or innocence, or that he ought to be punished? Three of them answering in the affirmative, were withdrawn from the pannel. The said John Fries was then informed by the court, that he had a right to challenge thirty-five of the jury, without shewing any cause of challenge against them, and as many more as he could shew cause of challenge against. He did accordingly challenge peremptorily thirty-four of the jury, and the trial proceeded. In the evening, the court adjourned till the next day, Friday, the 25th of April; when after the district attorney had stated the principal facts proved by the witnesses, and had applied the law to those facts, this respondent, with the concurrence of his colleague, the said Richard Peters, delivered to the jury the charge contained and expressed in exhibit marked No. 3, and herewith filed, which he prays may be taken as part of this his answer.

Immediately after the petit jury had delivered their verdict, this respondent informed the said Fries, from

the bench, that if he, or any person for him, could shew any legal ground, or sufficient cause to arrest the judgment, ample time would be allowed him for that purpose. But no cause being shewn, sentence of death was passed on the said Fries, on Tuesday the 2d day of May, 1800, the last day of the term; and he was afterwards pardoned by John Adams, then President of the United States.

And this respondent further answering saith, that if the two instances of misconduct, first stated in support of the general charge, contained in the first article of impeachment, were true as alleged, yet the inference drawn from them, viz. "that the said Fries was thereby deprived of the benefit of counsel for his defence," is not true. He insists that the said Fries was deprived of the benefit of counsel, not by any misconduct of this respondent, but by the conduct and advice of the above-mentioned William Lewis and Alexander James Dallas, who having been, with their own consent, assigned by the court as counsel for the prisoner, withdrew from his defence, and advised him to refuse other counsel when offered to him by the court, under pretence that the law had been prejudged, and their liberty of conducting the defence, according to their own judgment, improperly restricted by this respondent; but in reality because they knew the law and the facts to be against them, and the case to be desperate, and supposed that their withdrawing themselves under this pretence, might excite odium against the court; might give rise to an opinion that the prisoner had not been fairly tried; and in the event of a conviction, which from their knowledge of the law and the facts they knew to be almost certain, might aid the prisoner in an application to the President for a pardon. That such was the real motive of the said prisoner's counsel, for depriving their client of legal assistance on his trial, this respondent is fully persuaded, and expects to make appear, not only from the circumstances of the case, but from their own frequent and public declarations.

As little can this respondent be justly charged with having by any conduct of his, endeavored to "wrest from the jury their indisputable right to hear argument, and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give." He denies, that he did at any time declare that the aforesaid counsel should not at any time address the jury, or did in any manner hinder them from addressing the jury on the law as well as on the facts arising in the case. It was expressly stated in the copy of his opinion delivered as above set forth to William Lewis, that the jury had a right to determine the law as well as the fact; and the said William Lewis and Alexander James Dallas were expressly informed, before they declared their resolution to abandon the defence, that they were at liberty to argue the law to the jury. This respondent believes that the said William Lewis did not read the opinion delivered to him as aforesaid, except a very small part at the beginning of it, and of course, acted upon it without knowing its contents: and that the said Alexander James Dallas read no part of the said opinion until about a year ago, when he saw a very imperfect copy, made in court by a certain W. S. Biddle.

And this respondent further answering, saith, that according to the constitution of the United States, *civil officers* thereof, and no other persons, are subject to impeachment; and they only for treason, bribery, corruption, or other high crime or misdemeanor, consisting in some act done or omitted, in violation of some law forbidding or commanding it; on conviction of which act, they *must* be removed from office; and may, after conviction, be indicted and punished therefor, according to law. Hence it clearly results, that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law; and that no evidence can be received on an impeachment, except such as on an indictment at law, for the same offence, would be ad-

missible. That a judge cannot be indicted or punished according to law, for any act whatever, done by him in his judicial capacity, and in a matter of which he has jurisdiction, through error of judgment merely, without corrupt motives, however manifest his error may be, is a principle resting on the plainest maxims of reason and justice, supported by the highest legal authority, and sanctioned by the universal sense of mankind. He hath already endeavored to shew, and he hopes with success, that all the opinions delivered by him in the course of the trials now under consideration, were correct in themselves, and in the time and manner of expressing them; and that even admitting them to have been incorrect, there was such strong reason in their favor, as to remove from his conduct every suspicion of improper motives. If these opinions were incorrect, his mistake in adopting them, or in the time or manner of expressing them, cannot be imputed to him as an offence of any kind, much less as a high crime and misdemeanor, for which he ought to be removed from office; unless it can be shewn by clear and legal evidence, that he acted from corrupt motives. Should it be considered that some impropriety is attached to his conduct, in the time and mode of expressing any of these opinions; still he apprehends, that a very wide difference exists between such impropriety, the casual effect of human infirmity, and a high crime and misdemeanor for which he may be impeached, and must on conviction be removed from office.

Finally, this respondent, having thus laid before this honorable court a true state of his case, so far as respects the first article of impeachment, declares, upon the strictest review of his conduct during the whole trial of John Fries for treason, that he was not on that occasion unmindful of the solemn duties of his office as judge; that he faithfully and impartially, and according to the best of his ability and understanding, discharged those duties towards the said John

Fries; and that he did not in any manner, during the said trial, conduct himself arbitrarily, unjustly or oppressively, as he is accused by the honorable the House of Representatives.

And the said Samuel Chase, for plea to the said first article of impeachment, saith, that he is not guilty of any high crime or misdemeanor, as in and by the said first article is alleged; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The second article of impeachment charges, that this respondent, at the trial of James Thompson Callender for a libel, in May 1800, did, "with intent to oppress and procure the conviction of the said Callender, overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind as to the publication from which the words, charged to be libellous in the indictment, were extracted."

In answer to this article, this respondent admits that he did, as one of the associate justices of the supreme court of the United States, hold the circuit court of the United States, for the district of Virginia, at Richmond, on Thursday the 22d day of May, in the year 1800, and from that day, till the 30th of the same month; when Cyrus Griffin, then district judge of the United States for the district of Virginia, took his seat in the said court; and that during the residue of that session of the said court, which continued till the day of June, in the same year, this respondent and the said Cyrus Griffin, held the said court together. But how far any of the other matters charged in this article, are founded in truth or law, will appear from the following statement; which he submits to this honorable court, by way of answer to this part of the accusation.

By an act of Congress passed on the 4th day of May, A. D. 1798, it is among other things enacted, "That if any person shall write, print, utter or publish, or

shall knowingly and wittingly assist and aid in writing, printing, uttering or publishing, any false, scandalous, and malicious writing or writings against the President of the United States, with intent to defame or to bring him into contempt or disrepute, such person, being thereof convicted, shall be punished by fine, not exceeding two thousand dollars, and by imprisonment, not exceeding two years:" and "that if any person shall be prosecuted under this act, it shall be lawful for him to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel; and the jury shall have a right to determine the law and the fact, under the direction of the court, as in other cases," as in and by the said act, commonly called the *sedition law*, to which this respondent begs leave to refer this honorable court, will more fully appear.

At the meeting of the last above mentioned circuit court, this respondent, as required by the duties of his office, delivered a charge to the grand jury; in which, according to his constant practice, and to his duty as a judge, he gave in charge to them, several acts of Congress for the punishment of offences, and among them, the above mentioned act, called the sedition law; and directed the said jury to make particular enquiry, concerning any breaches of these statutes or any of them, within the district of Virginia. On the 24th day of May, 1800, the said jury found an indictment against one James Thompson Callender, for printing and publishing, against the form of the said act of Congress, a false, scandalous, and malicious libel, called "The Prospect before Us," against John Adams, then President of the United States, in his official character as President; as appears by an official copy of the said indictment, marked exhibit No. 4. which this respondent begs leave to make part of this his answer.

On Wednesday, the 28th day of the same month, May, 1800, Philip Norbonne Nicholas, esq. now attorney general of the state of Virginia, and George

Hay, esq. now district attorney of the United States, for the district of Virginia, appeared in the said circuit court as counsel for the said Callender; and on Tuesday the 3d of June following, his trial commenced, before this respondent, and the said Cyrus Griffin, who then sat as assistant judge. The petit jurors being called over, eight of them appeared, namely, Robert Gamble, Bernard Mackham, John Barrell, William Austin, William Richardson, Thomas Tinsley, Matthew Harvey and John Basset, who as they came to the book to be sworn, were severally asked on oath, by direction of the court, "whether they had ever formed and delivered any opinion respecting the subject matter then to be tried, or concerning the charges contained in the indictment?" They all answered in the negative, and were sworn in chief to try the issue. The counsel for the said Callender declaring, that it was unnecessary to put this question to the other four jurymen, William Mayo, James Hayes, Henry S. Shore and John Prior, they also were immediately sworn in chief. No challenge was made by the said Callender or his counsel, to any of these jurors; but the said counsel declared, that they would rely on the answer that should be given by the said jurors, to the question thus put by order of the court.

After the abovementioned John Basset, whom this respondent supposes and admits to be the person mentioned in the article of impeachment now under consideration, had thus answered in the negative to the question put to him by order of the court, as abovementioned, which this respondent states to be the legal and proper question, to be put to jurors on such occasions, he expressed to the court, his wish to be excused from serving on the said trial, because he had made up his mind, or had formed his opinion, "that the publication, called 'The Prospect before Us,' from which the words charged in the indictment as libellous were said to be extracted, but which he had never seen,

was, according to the representation of it, which he had received, within the sedition law." But the court did not consider this declaration by the said John Basset, as a sufficient reason for withdrawing him from the jury, and accordingly directed him to be sworn in chief.

In this opinion and decision, as in all the others delivered during the trial in question, this respondent concurred with his colleague, the afore mentioned Cyrus Griffin, in whom none of these opinions have been considered as criminal. He contends that the opinion itself was legal and correct; and he denies that he concurred in it, under the influence of any "spirit of prosecution and injustice," or with any "intent to oppress and procure the conviction of the prisoner;" as is most untruly alleged by the second article of impeachment. His reasons were correct and legal. He will submit them with confidence to this honorable court; which, although it cannot condemn him for an incorrect opinion, proceeding from an honest error in judgment, and ought not to take on itself the power of enquiring into the correctness of his decisions, but merely that of examining the purity of his motives; will, nevertheless, weigh his reasons, for the purpose of judging how far they are of sufficient force, to justify a belief that they might have appeared satisfactory to him. If they might have so appeared, if the opinion which he founded on them be not so palpably and glaringly wrong, as to carry with it internal evidence of corrupt motives, he cannot in delivering it have committed an offence.

This honorable court need not be informed, that it is the duty of courts before which criminal trials take place, to prevent jurors from being excused for light and insufficient causes. If this rule were not observed, it would follow, that as serving on such trials as a juror, is apt to be a very disagreeable business, especially to those best qualified for it, there would be a great diffi-

culty, and often an impossibility, in finding proper juries. The law has therefore established a fixed and general rule on this subject, calculated not to gratify the wishes or the unreasonable scruples of jurors, but to secure to the party accused, as far as in the imperfection of human nature it can be secured, a fair and impartial trial. The criterion established by this rule is, "that the juror stands indifferent between the government and the person accused, as to the matter *in issue*, on the indictment." This indifference is always, according to a well known maxim of law, to be presumed, unless the contrary appear; and the contrary may be alleged by way of excuse by the juror himself, or by the prisoner by way of challenge. Even if not alleged, it may be inquired into by the court of its own mere motion, or on the suggestion of the prisoner, and it may be established by the confession of the juror himself, on oath, or by other testimony.

But in order to shew that a juror does not "stand indifferent between the accuser and the accused, *as to the matter in issue*," it is not sufficient to prove that he has expressed a general opinion, "that such an offence as that charged by the indictment ought to be punished;" or "that the party accused, if guilty of the offence charged against him, ought to be punished;" or "that a book, for printing and publishing which the party is indicted, comes within the law on which the indictment is founded." All these are general expressions of opinion, as to the criminality of an act of which the party is accused, and of which he *may* be guilty; not declarations of an opinion that he actually is guilty of the offence with which he stands charged. It is impossible for any man in society to avoid having, and extremely difficult for him to avoid expressing, an opinion, as to the criminality or innocence of those acts, which for the most part are the subjects of indictments for offences of a public nature; such as treason, sedition,

and libels against the government. Such acts always engage public attention, and become the subject of public conversation; and if to have formed or expressed an opinion, as to the general nature of those acts, were a sufficient ground of challenge to a juror, when alleged against him, or of excuse from serving when alleged by himself, it would be in the power of almost every offender, to prevent a jury from being impannelled to try him, and of almost every man, to exempt himself from the unpleasant task of serving on such juries. The magnitude and heinous nature of an offence, would give it a greater tendency to attract public attention, and to draw forth public expressions of indignation; and would thus increase its chance of impunity.

To the present case this reasoning applies with peculiar force. The "Prospect before Us," is a libel so profligate and atrocious, that it excited disgust and indignation in every breast not wholly depraved. Even those whose interest it was intended to promote, were, as this respondent has understood and believes, either so much ashamed of it, or so apprehensive of its effects, that great pains were taken by them to withdraw it from public and general circulation. Of such a publication, it must have been extremely difficult to find a man of sufficient character and information to serve on a jury, who had not formed an opinion, either from his own knowledge, or from report. The juror in the present case had expressed no opinion. He had formed no opinion, as to the facts. He had never seen the "Prospect before Us," and therefore could have formed no fixed or certain opinion about its nature or contents. They had been reported to him, and he had formed an opinion that if they were such as reported, the book was within the scope and operation of a law for the punishment of "false, scandalous and malicious libels, against the President in his official capacity, written or published

with intent to defame him." And who is there, that having either seen the book or heard of it, had not necessarily formed the same opinion?

But this juror had formed no opinion about the guilt or innocence of the party accused; which depended on four facts wholly distinct from the opinion which he had formed. First, whether the contents of the book were really such as had been represented to him? Secondly, whether they should, on the trial, be proved to be true? Thirdly, whether the party accused was really the author or publisher of this book? And fourthly, whether he wrote or published it "with intent to defame the President, or to bring him into contempt or disrepute, or to excite against him the hatred of the good people of the United States?" On all these questions, the mind of the juror was perfectly at large, notwithstanding the opinion which he had formed. He might, consistently with that opinion, determine them all in the negative; and it was on them that the issue between the United States and James Thompson Callender depended. Consequently, this juror, notwithstanding the opinion which he had thus formed, did stand indifferent as to the matter in issue, in the legal and proper sense, and in the only sense in which such indifference can ever exist; and therefore his having formed that opinion, was not such an excuse as could have justified the court in discharging him from the jury.

That this juror did not himself consider this opinion as an opinion respecting the "matter in issue," appears clearly from this circumstance, that when called upon to answer on oath, "whether he had expressed any opinion as to the matter in issue?" he answered that he had not. Which clearly proves that he did not regard the circumstance of his having formed this opinion, as a legal excuse, which ought to exempt him of right from serving on the jury; but merely suggested it as a motive of delicacy, which induced

him to wish to be excused. To such motives of delicacy, however commendable in the persons who feel them, it is impossible for courts of justice to yield, without putting it in the power of every man, under pretence of such scruples, to exempt himself from those duties which all the citizens are bound to perform. Courts of justice must regulate themselves by legal principles, which are fixed and universal; not by delicate scruples, which admit of endless variety, according to the varying opinions and feelings of men.

Such were the reasons of this respondent, and he presumes of his colleague the said Cyrus Griffin, for refusing to excuse the said John Basset, from serving on the jury above mentioned. These reasons, and the decision founded on them, he insists were legal and valid. But if the reasons should be considered as invalid, and the decision as erroneous, can they be considered as so clearly and flagrantly incorrect, as to justify a conclusion that they were adopted by this respondent, through improper motives? Are not these reasons sufficiently strong, or sufficiently plausible, to justify a candid and liberal mind in believing, that a judge might honestly have regarded them as solid? Has it not been conceded, by the omission to prosecute judge Griffin for this decision, that his error, if he committed one, was an honest error? Whence this distinction between this respondent and his colleague? And why is that opinion imputed to one as a crime, which in the other is considered as innocent?

And the said Samuel Chase, for plea to the said second article of impeachment, saith, that he is not guilty of any high crime or misdemeanor, as in and by the said second article is alleged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The third article of impeachment alleges that this respondent "with intent to oppress and procure the conviction of the prisoner, did not permit the evidence of John Taylor, a material witness in behalf of the said Callender, to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact."

In answer to this charge, this respondent begs leave to submit the following facts and observations:

The indictment against James Thompson Callender, which has been already mentioned, and of which a copy is exhibited with this answer, consisted of two distinct and separate counts, each of which contained twenty distinct and independent charges, or sets of words. Each of those sets of words was charged as a libel against John Adams, as President of the United States, and the twelfth charge embraced the following words, "He (meaning President Adams) was a professed aristocrat; he proved faithful and serviceable to the British interest." The defence set up was confined to this charge, and was rested upon the truth of the words. To the other nineteen charges, no defence of any kind was attempted or spoken of, except such as might arise from the supposed unconstitutionality of the sedition law; which, if solid, applied to the twelfth charge, as well as to the other nineteen. It was to prove the truth of these words, that John Taylor, the person mentioned in the article of impeachment now under consideration, was offered as a witness. It can hardly be necessary to remind this honorable court, that when an indictment for a libel contains several distinct charges, founded on distinct sets of words, the party accused, who in such cases is called the "traverser," must be convicted, unless he makes a sufficient defence against every charge. His innocence on one, does not prove him innocent on the others. If the sedition law should be

considered as unconstitutional, the whole indictment, including this twelfth charge, must fall to the ground, whether the words in question were proved to be true or not. If the law should be considered as constitutional, then the traverser, whether the words in the twelfth charge were proved to be true or not, must be convicted on the other nineteen charges, against which no defence was offered. This conviction on nineteen charges, would put the traverser as completely in the power of the court, by which the amount of the fine and the term of the imprisonment were to be fixed, as a conviction upon all the twenty charges. The imprisonment could not exceed two years, nor the fine be more than two thousand dollars. If then this respondent were desirous of procuring the conviction of the traverser, he was sure of his object, without rejecting the testimony of John Taylor. If his temper towards the traverser were so vindictive, as to make him feel anxious to obtain an opportunity and excuse for inflicting on him the whole extent of punishment permitted by the law, still a conviction on nineteen charges afforded this opportunity and excuse, as fully as a conviction on twenty charges. One slander more or less, in such a publication as the "Prospect before Us," could surely be of no moment. To attain this object, therefore, it was not necessary to reject the testimony of John Taylor.

That the court did not feel this vindictive spirit, is clearly evinced by the moderation of the punishment, which actually was inflicted on the traverser, after he was convicted of the whole twenty charges. Instead of two thousand dollars, he was fined only two hundred, and was sentenced to only nine months imprisonment, instead of two years. And this respondent avers, that he never felt or expressed a wish to go further; but that in this decision, as well as in every other given in the course of the trial, he fully and freely concurred with his colleague, judge Griffin.

As a further proof that his rejection of this testimony did not proceed from any improper motive, but from a conviction in his mind that it was legally inadmissible, and that it was, therefore, his duty to reject it, he begs leave to state, that he interfered, in order to prevail on the district attorney to withdraw his objection to those questions, and consent to their being put; which that officer refused to do, on the ground "that he did not feel himself at liberty to consent to such a departure from legal principles."

Hence appears the utter futility of a charge, which attributes to this respondent a purpose as absurd as it was wicked; and without the slightest proof, imputes to the worst motives in him the same action, which in his colleague is considered as free from blame. But this respondent will not content himself with shewing, that his conduct in concurring with his colleague in the rejection of John Taylor's testimony, could not have proceeded from the motives ascribed to him; but he will show that this rejection, if not strictly legal and proper, as he believes and insists that it is, rests on legal reasons of sufficient force to satisfy every mind, that a judge might have sincerely considered it as correct.

The words stated as the ground of the twelfth charge above mentioned, are stated in the indictment as one entire and indivisible paragraph, constituting one entire offence. This respondent considered them at the trial, and still considers them, as constituting one entire charge, and one entire offence; and that they must be taken together in order to explain and support each other. It is clear that no words are indictable as libellous, except such as expressly, or by plain implication, charge the person against whom they are published, with some offence either legal or moral. To be an "aristocrat," is not in itself an offence, either legal or moral, even if it were a charge susceptible of proof; neither was it an offence either

legal or moral, for Mr. Adams to be "faithful and serviceable to the British interest," unless he thereby betrayed or endangered the interests of his own country; which does not necessarily follow, and is not directly alleged in the publication. These two phrases, therefore, taken separately, charge Mr. Adams with no offence of any kind; and, consequently, could not be indictable as libellous: but taken together, they convey the implication that Mr. Adams, being an "aristocrat," that is, an enemy to the republican government of his own country, had subserved the British interest, against the interest of his own country; which would, in his situation, have been an offence both moral and legal; to charge him with it was, therefore, libellous.

Admitting, therefore, these two phrases to constitute one distinct charge, and one entire offence, this respondent considers and states it to be law, that no justification which went to part only of the offence, could be received. The plea of justification must always answer the whole charge, or it is bad on the demurrer; for this plain reason, that the object of the plea is to shew the party's innocence; and he cannot be innocent, if the accusation against him be supported in part. Where the matter of defence may be given in evidence, without being formally pleaded, the same rules prevail. The defence must be of the same nature, and equally complete, in one case as in the other. The only difference is in the manner of bringing it forward. Evidence, therefore, which goes only to justify the charge in part, cannot be received. It is not indeed necessary, that the whole of this evidence should be given by one witness. The justification may consist of several facts, some of which may be proved by one person, and some by another. But proof, in such cases, must be offered as to the whole, or it cannot be received.

In the case under consideration, no proof was offered as to the whole matter contained in the twelfth

article. No witness except the above mentioned John Taylor, was produced or mentioned. When a witness is offered to a court and jury, it is the right and duty of the court, to require a statement of the matters intended to be proved by him. This is the invariable practice of all our courts, and was done most properly by this respondent and his colleague, on the occasion in question. From the statement given by the traverser's counsel, of what they expected to prove by the said witness, it appeared that his testimony could have no possible application to any part of the indictment, except the twelfth charge above mentioned, and but a very weak and imperfect application even to that part. The court, therefore, as it was their right and duty, requested that the questions intended to be put to the witness, should be reduced to writing, and submitted to their inspection; so as to enable them to judge more accurately, how far those questions were proper and admissible. This being done, the questions were of the following tenor and effect:

1st. "Did you ever hear Mr. Adams express any sentiments favorable to monarchy, or 'aristocracy,' and what were they?"

2d. "Did you ever hear Mr. Adams, while Vice President, express his disapprobation of the funding system?"

3d. "Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?"

The second question, it is manifest, had nothing to do with the twelfth charge; for Mr. Adams's approbation or disapprobation of the funding system, could not have the most remote tendency to prove that he was an aristocrat, or had proved faithful and serviceable to the British interest. In that part of the publication which furnishes the matter of the thirteenth

charge in the indictment, it is indeed stated, that Mr. Adams, "when but in a secondary station, censured the funding system," but these words are in themselves wholly immaterial; and no attempt was made, nor any evidence offered or spoken of, to prove the truth of the other matter contained in the thirteenth charge. It was from their connection with that other matter, that these words could alone derive any importance; and consequently their truth or falsehood was altogether immaterial, while that other matter remained unproved. This question, therefore, which went solely to those immaterial words, was clearly inadmissible. The third question was, in reality, as far as the second from any connection with the matter in issue, although its irrelevancy is not quite so apparent. Mr. Adams's having voted against the two measures alluded to in that question, if he did in fact vote against them, could by no means prove that he was "faithful and serviceable to the British interest," in any sense, much less with those improper and criminal views, with which the publication in question certainly meant to charge him. He might, in the honest and prudent performance of his duty towards his government and his country, incidentally promote the interests of another country; but it was by no means competent for a jury to infer from thence, that he was "faithful" to that other country, or, in other words, that he held the interests of that other country chiefly in view, and was actuated in giving his vote by a desire to promote them, independently of, or without regard to, the interests of his own country. Such an inference could not be made from the fact, admitting it to be true. The fact, if true, was *no* evidence to support such an inference, therefore the fact was immaterial; and as it is the province and duty of the court, in such circumstances, to decide on the materiality of facts offered in evidence, it follows clearly, that it was the right and duty of the court, in this instance, to reject the third question; an affirmative

answer to which could have proved nothing in support of the defence.

The first question, therefore, and the only remaining one proposed to be put to this witness, stood alone; and an affirmative answer to it, if it could have proved any thing, could have proved only a part of the charge; namely, that Mr. Adams was an aristocrat. But evidence to prove a part only of an entire and indivisible charge, was inadmissible for the reasons stated above.

If, on the other hand, the phrases in question, "that Mr. Adams was an aristocrat," that "he had proved faithful and serviceable to the British interest," were distinct and divisible, and constituted two distinct charges, which may perhaps be the proper way of considering them, still the above mentioned questions were improper and inadmissible, in that point of view.

The first charge in that case is, that Mr. Adams "was an aristocrat." To be an aristocrat, even if any precise and definite meaning could be affixed to the term, is not an offence either legal or moral; consequently, to charge a man with being an aristocrat is not a libel; and such a charge in an indictment for a libel, is wholly immaterial. Nothing is more clear, than that immaterial matters in legal proceedings ought not to be proved, and need not be disproved. In the next place, the term "aristocrat" is one of those vague indefinite terms, which admit not of precise meaning, and are not susceptible of proof. What one person might consider as aristocracy, another would consider as republicanism, and a third as democracy. If indictments could be supported on such grounds, the guilt or innocence of the party accused, must be measured not by any fixed or known rule, but by the opinions which the jurors appointed to try him might happen to entertain, concerning the nature of aristocracy, democracy or republicanism. And, lastly, the question itself was as vague, and as void of precise

meaning, as the charge of which it was intended to furnish the proof. The witness was called upon to declare "whether he had heard Mr. Adams express any and what opinions, favorable to aristocracy or monarchy?" How was it to be determined, whether an opinion was favorable to aristocracy or monarchy? One man would think it favorable and another not so, according to the opinions which they might respectively entertain, on political subjects. The first question, therefore, was inconclusive, immaterial and inadmissible.

The second, as has already been remarked, was wholly and manifestly foreign from the matter in issue. Mr. Adams's dislike of the funding system, if he did in fact dislike it, had nothing to do with his aristocracy or his faithfulness to the British interest. There is no pretence for saying, that such a question ought to have been admitted.

As to the third, "whether Mr. Adams had not voted against the sequestration of British property, and the suspension of commercial intercourse with Great Britain," it has already been shewn to be altogether improper; on the ground that such votes, if given by Mr. Adams, were no evidence whatever of his having been "faithful and serviceable to the British interest." If he had been so, provided it were, in his opinion, at the same time useful to the interests of his own country, which it well might be, and the contrary of which is not alleged by this part of the publication, taken separately, it was no offence of any kind; and to charge him with it was not a libel. The charge was, therefore, immaterial and futile, and no evidence for or against it could properly be received. And, finally, if the charge had been material, and the giving of these votes had been legal evidence to prove it, that fact was on record in the journals of the Senate, and might have been proved by that record, or an official copy of it. As this evi-

dence was the highest of which the case admitted, no inferior evidence of it, such as oral proof is well known to be, could be admitted.

For these reasons this respondent did concur with his colleague, the said Cyrus Griffin, in rejecting the three above mentioned questions; but not any other testimony that the said John Taylor might have been able to give. In this he insists that he acted legally and properly, according to the best of his ability. If he erred, it is impossible, for the reasons stated by him in the beginning of his answer to this article, to suppose that he erred wilfully: since he could have had no possible motive for a piece of misconduct so shameful, and at the same time so well calculated to give offence. In a point so liable to misapprehension and misrepresentation, and so likely to be used as a means of exciting public odium against him, it is far more probable, that had he been capable of bending his opinion of the law to other motives, he would have admitted illegal testimony; which, taken in its utmost effect, could have had no tendency to thwart those plans of vengeance against the traverser, under the influence of which he is supposed to have acted.

If his error was an honest one, which as his colleague also fell into it, might in charity be supposed; and, as there is not a shadow of evidence to the contrary, must in law be presumed; he cannot, for committing it, be convicted of any offence, much less a high crime and misdemeanor, for which he must, on conviction, be deprived of his office.

And for plea to the said third article of impeachment, the said Samuel Chase, saith, that he is not guilty of any high crime or misdemeanor, as in and by the said third article is alleged against him: and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The fourth article of impeachment alleges, that during the whole course of the trial of James Thompson Callender, above mentioned, the conduct of this respondent was marked by "manifest injustice, partiality, and intemperance;" and five particular instances of the "injustice, partiality, and intemperance," are adduced.

The first consists, "in compelling the prisoner's counsel to reduce to writing and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above mentioned John Taylor, the witness."

This respondent, in answer to this part of the article now under consideration, admits that the court, consisting of himself and the above mentioned Cyrus Griffin, did require the counsel for the traverser, on the trial of James Thompson Callender, above mentioned, to reduce to writing the questions which they intended to put to the said witness. But he denies that it is more his act than the act of his colleague, who fully concurred in this measure. The measure, as he apprehends and insists, was strictly legal and proper; his reasons for adopting it, and he presumes those of his colleague, he will submit to this honorable court, in order to shew that if he, in common with his colleague, committed an error, it was an error into which the best and wisest men might have honestly fallen.

It will not be denied, and cannot be doubted, that according to our laws, evidence, whether oral or written, may be rejected and prevented from going before the jury, on various grounds.—1st, For incompetency: where the source from which the evidence is attempted to be drawn, is an improper source: as if a witness were to be called who was infamous, or interested in the event of the suit; or a paper should be offered in evidence, which was not between the same parties, or was not executed in the forms pre-

scribed by law. 2d, For irrelevancy: when the evidence offered is not such, as in law will warrant the jury to infer the fact intended to be proved; or where that fact, if proved, is immaterial to the issue. For these reasons, and perhaps for others which might be specified, evidence may properly be rejected, in trials before our courts.

As little can it be doubted, that according to our laws, the court and not the jury is the proper tribunal for deciding all questions relative to the admissibility of evidence. The effect of the evidence when received, is to be judged of by the jury; but whether it ought to be received, must be determined by the court. This arises from the very constitution of the trial by jury; one fundamental principle of which is, that the jury must decide the case, not according to vague notions, secret impressions or general belief, but according to legal and proper evidence delivered in court. So strictly is this rule observed, that if one juror have any knowledge of the matter in dispute, it may influence his own judgment, but not that of his fellow jurors, unless he state it to them on oath, in open court; and nothing is more common than for our courts, after all the evidence which the party can produce has been offered and received, to tell the jury that there is no evidence to support the claim, or the defence; or when proof is offered of a certain fact, to determine that such fact is not proper to be given in evidence.

Hence it results, and is every day's practice, that when a witness is produced, or a writing is offered in evidence, the opposite party having a right to object to the evidence if he should think it improper, requires to be informed what the witness is to prove, or to see the writing, before the first is examined, or the second is read to the jury. The court has the same right, resulting necessarily from its power to decide all questions relative to the admissibility of evi-

dence. This right our courts are in the constant habit of exercising; not only when objections are made by the parties, but when there being no objection, the court itself has reason to suspect that the testimony is improper. In most cases, but not in all, consent by the opposite party removes all objections to the admissibility of evidence, and courts sometimes infer consent from silence; but as it is their duty to take care, that no improper or illegal evidence goes to the jury, unless the objection to it be removed by consent of parties; it is consequently their duty, in all cases where they see reason to suspect that the evidence offered is improper, to ascertain whether consent has been given, or whether the seeming acquiescence of the opposite party has proceeded from inattention. This is more particularly their duty in *criminal* cases, where they are bound to be counsel for the government, as well as for the party accused.

It being thus the right and duty of a court before which a trial takes place, to inform itself of the nature of the evidence offered, so as to be able to judge whether such evidence be proper, it results necessarily that they have a right to require, that any question intended to be put to a witness, should be reduced to writing, for that is the form in which their deliberation upon it may be most perfect, and their judgment will be most likely to be correct. In the case now under consideration, the court did exercise this right.—When the testimony of John Taylor was offered, the court enquired of the traverser's counsel, what that witness was to prove. The statement of his testimony given in answer, induced the court to suspect that it was irrelevant and inadmissible. They therefore, that they might have an opportunity for more careful and accurate consideration, called upon the counsel to state in writing, the questions intended to be put to the witness.

This is the act done by the court, but concurred in by the respondent, which has been selected and adduced as one of the proofs and instances of "manifest injustice, partiality, and intemperance" on his part. He owes an apology to this honorable court, for having occupied so much of its time with the refutation of a charge which has no claim to serious consideration, except what it derives from the respect due to the honorable body by which it was made, and the high character of the court where it is preferred.

The next circumstance stated by the article now under consideration, as an instance and proof of "manifest injustice, partiality, and intemperance" in this respondent, is his refusal to postpone the trial of the said James Thompson Callender, "although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused, and although it was manifest that with the utmost diligence, the attendance of such witnesses could not have been procured at that term."

This respondent, in answer to this part of the charge, admits, that in the above mentioned trial, the traverser's counsel did move the court, while this respondent sat in it alone, for a continuance of the case until the next term; not merely a postponement of the trial, as the expressions used in this part of the article would seem to import; and did file as the ground work of their motion, an affidavit of the traverser, a true and official copy of which, marked exhibit No. 5, this respondent herewith exhibits, and begs leave to make part of this answer; but he denies that any sufficient ground for a continuance until the next term, was disclosed by this affidavit; as he trusts will clearly appear from the following facts and observations.

The trial of an indictment at the term when it is found by the grand jury, is a matter of course, which the prosecutor can claim as a right, unless legal cause

can be shewn for a continuance. The prosecutor may consent to a continuance, but if he withholds his consent, the court cannot grant a continuance without legal cause. Of the sufficiency and legality of this cause, as of every other question of law, the court must judge; but it must decide on this as on every other point, according to the fixed and known rules of law.

One of the legal grounds, and the principal one on which such a continuance may be granted, is the absence of competent and *material* witnesses, whom the party cannot produce at the present term, but has a *reasonable ground* for expecting to be able to produce at the next term. Analagous to this, is the inability to procure at the present term, legal and *material* written testimony, which the party has a *reasonable expectation* of being able to procure at the next term.

These rules are as reasonable and just in themselves, as they are essential to the due administration of justice, to the punishment of offences on the one hand, and to the protection of innocence on the other. If the continuance of a cause, on the application of the party accused, were a matter of right, it is manifest that no indictment would be brought to trial until after a delay of many months. If, on the other hand, the granting of a continuance depended not on fixed rules, but on the arbitrary will of the court, it would follow that weakness or partiality might induce a court, on some occasions, to extend a very improper indulgence to the party accused; while on others, passion or prejudice might deprive him of the necessary means of making his defence. Hence the necessity of fixed rules, which the judges are bound to expound and apply, under the solemn sanction of their oath of office.

The true and only reason for granting a continuance, is that the party accused may have the best opportu-

nity that the laws can afford to him, of making his defence. But incompetent or immaterial witnesses, could not be examined if they were present; and consequently, their absence can deprive the party of no opportunity which the laws afford to him, of making his defence. Hence the rule, that the witnesses must be competent and material.

Public justice will not permit the trial of offenders to be delayed, on light or unfounded pretences. To wait for testimony which the party really wished for, but did not expect to be able to produce within some definite period, would certainly be a very light pretence; and to make him the judge, how far there was reasonable expectation of obtaining the testimony within the proper time, would put it in his power to delay the trial, on the most unfounded pretences. Hence the rule, that there must be reasonable ground of expectation, in the judgment of the court, that the testimony may be obtained within the proper time.

It is therefore a settled and most necessary rule, that every application for a continuance, on the ground of obtaining testimony, must be supported by an affidavit, disclosing sufficient matter to satisfy the court, that the testimony wanted "is competent and material," and that there is "reasonable expectation of procuring it within the time prescribed." From a comparison of the affidavit in question with the indictment, it will soon appear how far the traverser in this case, brought himself within this rule.

The absent witnesses, mentioned in the affidavit, are William Gardner, of Portsmouth, in New-Hampshire; Tench Coxe, of Philadelphia, in Pennsylvania; Judge Bee, of some place in South-Carolina; Timothy Pickering, lately of Philadelphia, in Pennsylvania, but of what place at that time, the deponent did not know; William B. Giles, of Amelia county, in the state of Virginia; Stephens Thompson Mason,

whose place of residence is not mentioned in the affidavit, but was known to be in Loudon county, in the state of Virginia; and General Blackburn, of Bath county, in the said state. The affidavit also states, that the traverser wished to procure, as material to his defence, authentic copies of certain answers made by the President of the United States, Mr. Adams, to addresses from various persons; and also, a book entitled "an Essay on Canon and Feudal Law," or entitled in words *to that purport*, which was ascribed to the President, and which the traverser believed to have been written by him; and also, evidence to prove that the President was in fact the author of that book.

It is not stated, that the traverser had any reasonable ground to expect, or did expect, to procure this book or evidence, or these authentic copies, or the attendance of any one of these witnesses, at the *next* term. Nor does he attempt to shew in what manner the book, or the copies of answers to addresses, were material, so as to enable the court to form a judgment on that point. Here then, the affidavit was clearly defective. His believing the book and copies to be material, was of no weight, unless he shewed to the court, sufficient grounds for entertaining the same opinion. Moreover he does not state, where he supposes that this book, and those authentic copies, may be found: so as to enable the court to judge, how far a reasonable expectation of obtaining them might be entertained. On the ground of this book and these copies, therefore, there was no pretence for a continuance. As to the witnesses, it is manifest, that, from their very distant and dispersed situation, there existed no ground of reasonable expectation, that their attendance could be procured at the *next* term, or at any subsequent time. Indeed, the idea of postponing the trial of an indictment, till witnesses could be convened at Richmond, from South Carolina, New-Hampshire, and the western extre-

mities of Virginia, is too chimerical to be seriously entertained. Accordingly, the traverser, though in his affidavit he stated them to be material, and declared that he could not procure their attendance at that term, could not venture to declare on oath, that he expected to procure it at the next, or at any other time; much less that he had any reasonable ground for such expectation. On this ground, therefore, the affidavit was clearly insufficient; and it was consequently the duty of the court to reject such application.

But the testimony of these witnesses, as stated in the affidavit, was wholly immaterial; and therefore, their absence was no ground for a continuance, had there been reasonable ground for expecting their attendance at the next term.

William Gardner and Tench Coxe, were to prove, that Mr. Adams had turned them out of office, for their political opinions or conduct. This applied to that part of the publication, which constituted the matter of the third charge in the indictment, in these words, "the same system of persecution extended all over the continent. Every person holding an office, must either quit it, or think and vote exactly with Mr. Adams."—Judge Bee was to prove, that Mr. Adams had advised and requested him by letter, in the year 1799, to deliver Thomas Nash, otherwise called Jonathan Robins, to the British consul, in Charleston. This might have had some application to the matter of the seventh charge; which alleged that "the hands of Mr. Adams, were reeking with the blood of the poor, friendless, Connecticut sailor." Timothy Pickering was to prove, that Mr. Adams, while President, and while Congress was in session, was many weeks in possession of important dispatches, from the American minister in France, without communicating them to Congress. This testimony was utterly immaterial; because, ad-

mitting the fact to be so, Mr. Adams was not bound, in any respect, to communicate those dispatches to Congress, unless in his discretion, he should think it necessary; and also, because the fact, if true, had no relation to any part of the indictment. There are, indeed, three charges, on which it might at first sight seem to have some slight bearing. These are the eighth, the words furnishing the matter of which are, "every feature in the administration of Mr. Adams, forms a distinct and additional evidence, that he was determined at all events, to embroil this country with France;" the fourteenth, the words stated in which, allege, that "by sending these ambassadors to Paris, Mr. Adams and his British faction, designed to do nothing but mischief," and the eighteenth, the matter of which states, "that in the midst of such a scene of profligacy and usury, the President persisted as long as he durst, in making his utmost efforts, for provoking a French war." To no other charge in the indictment, had the evidence of Timothy Pickering, as stated in the affidavit, the remotest affinity. And surely, it will not be pretended by any man, who shall compare this evidence, with the three charges above mentioned, that the fact intended to be proved by it, furnished any evidence proper to go to a jury, in support of either of those charges, that "every feature of his administration, formed a distinct and additional evidence, of a determination at all events, to embroil this country with France," that "in sending ambassadors to Paris, he intended nothing but mischief," that "in the midst of a scene of profligacy and usury, he persisted, as long as he durst, in making his utmost efforts for provoking a French war," are charges, which surely cannot be supported or justified, by the circumstance of his 'keeping in his possession, for several weeks, while Congress was in session, dispatches from the American minister in France, without

communicating them to Congress,' which he was not bound to do, and which it was his duty not to do, if he supposed that the communication, at an earlier period, would be injurious to the public interest. The testimony of William B. Giles and Stephens Thompson Mason, was to prove, that Mr. Adams had uttered, in their hearing, certain sentiments, favorable to aristocratic or monarchical principles of government.

This, had no application except to a part of the twelfth charge; which has been already shewn to be wholly immaterial if taken separately, and wholly incapable of a separate justification, if considered as part of an entire charge. And, lastly, it was to be proved by general Blackburn, that in his answer to an address, Mr. Adams avowed, "that there was a party in Virginia, which deserved to be humbled into dust and ashes, before the indignant frowns of their injured, insulted, and offended country." There were but two charges in the indictment to which this fact, if true, had the most distant resemblance.—These are the fifteenth and sixteenth, the words forming the matter of which, call Mr. Adams, "an hoary-headed libeller of the governor of Virginia, who with all the fury, but without the propriety or sublimity of Homer's Achilles, bawled out, to arms, then, to arms!" and "who floating on the bladder of popularity, threatened to make Richmond the centre point of a bonfire." It would be an abuse of the patience of this honorable court, to occupy any part of it's time in proving, that the fact intended to be proved by general Blackburn, could not in the slightest degree support or justify such charges as these. This is the account given of the testimony of the absent witnesses, by the affidavit filed as the ground of the motion for a continuance. From a comparison of it with the indictment, it will appear, that out of twenty charges in the indictment, there were but eight,

to which any part of the testimony of these witnesses had the most distant allusion; and that of those eight charges there are five, which the testimony, having some allusions to them, could not in the slightest degree support. Twelve charges, therefore, remained without even an attempt to justify them; and seventeen were wholly destitute of any legal or sufficient justification. On these seventeen charges, therefore, the traverser must have been convicted; even if the remaining three had been completely justified by the testimony of the absent witnesses. The conviction on these seventeen charges, or even on one of them, would have put it into the power of the court to fine and imprison the traverser, to the whole extent allowed by the law. If the truth of these three charges, admitting it to be established, could have any effect in mitigating the punishment, which depended on the court and not on the jury, the court in passing sentence might make, and in this case, actually did make, the fullest abatement on that account that the testimony if adduced would warrant.

This testimony, therefore, was in every view immaterial; and had it been material, there existed no ground of reasonable expectation, that it could be obtained at the next term, or any future term. For these reasons, and not from those criminal motives, which without the least shadow of proof are ascribed to him, this respondent did over-rule and reject the motion for a continuance till the next term: as it was his duty to do, since he had no discretion in the case, but was bound by the rules of law.

But in order to afford every accommodation to the traverser and his counsel, which it was in his power to give, this respondent did offer to postpone the trial for a month or more, in order to afford them full time for preparation, and for procuring such testimony as was within their reach. This indulgence they thought proper to refuse.

On Monday, the second, and Tuesday, the third day of June, 1800, when judge Griffin had taken his seat in court, and was on the bench, the counsel for the traverser, renewed their motion for a continuance, founded on the same affidavit; and after a full hearing and consideration of the argument, the court, judge Griffin concurring, overruled the motion, and ordered the trial to proceed.

If this decision be correct, as he believes and insists that it is, no offence could be committed by him in making or concurring in it. It was a proper and legal performance of his duty as a judge. If it be erroneous, still the error, if an honest one, cannot be an offence, much less a high crime and misdemeanor; and as in his colleague it has been considered as an honest error, he confidently trusts it will be considered so in him also.

To the third charge adduced in support of the article now under consideration, the charge of using "unusual, rude, and contemptuous expressions, towards the prisoner's counsel," and of "falsely insinuating, that they wished to excite the public fears and indignation, and to produce that insubordination to law, to which the conduct of this respondent did manifestly tend," he cannot answer otherwise than by a general denial. A charge so vague, admits not of precise or particular refutation. He denies that there was any thing unusual or intentionally rude or contemptuous in his conduct or his expressions towards the prisoner's counsel; that he made any false insinuation whatever against them, or that his own conduct tended in any manner to produce insubordination to law. On the contrary, it was his wish and intention, to treat the counsel with the respect due to their situation and functions, and with the decorum due to his own character. He thought it his duty to restrain such of their attempts as he considered improper, and to overrule motions made by them, which he considered as unfounded in

law; but this it was his wish to accomplish in the manner least likely to offend, from which every consideration concurred in dissuading him. He did indeed think at that time, and still remains under the impression, that the conduct of the traverser's counsel, whether from intention or not he will not undertake to say, was disrespectful, irritating, and highly incorrect. That conduct which he viewed in this light, might have produced some irritation in a temper naturally quick and warm, and that this irritation might, notwithstanding his endeavors to suppress it, have appeared in his manner and in his expressions, he thinks not improbable; for he has had occasions of feeling and lamenting the want of sufficient caution and self-command, in things of this nature. But he confidently affirms, that his conduct in this particular was free from intentional impropriety; and this respondent denies, that any part of his conduct was such as ought to have induced the traverser's counsel to "abandon the cause of their client," nor does he believe that any such cause did induce them to take that step. On the contrary, he believes that it was taken by them under the influence of passion or for some motive into which this respondent forbears at this time to enquire. And this respondent admits, that the said traverser was convicted and condemned to fine and imprisonment, but not by reason of the abandonment of his defence by his counsel; but because the charges against him were clearly proved, and no defence was made or attempted against far the greater number of them.

The fourth charge in support of this article, attributes to this respondent, "repeated and vexatious interruptions of the said counsel, which at length indueed them to abandon the cause of their client, who was therefore convicted, and condemned to fine and imprisonment." To this charge also, it is impossible to give any other answer but a general denial. He avers that he never interrupted the traverser's counsel

vexatiously, or except when he considered it his duty to do so. It cannot be denied that courts have power to interrupt counsel, when in their opinion the correctness of proceeding requires it. In this, as in every thing else, they may err. They may sometimes act under the influence of momentary passion or irritation, to which they in common with other men, are liable. But unless their conduct in such cases, though improper or ill-judged, be clearly shewn to proceed, not from human infirmity, but from improper motives, it cannot be imputed to them as an offence, much less as a crime or misdemeanor.

Lastly, this respondent is charged under this article, with an "indecent solicitude, manifested by him, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice." This is another charge of which it is impossible to give a precise refutation, and to a general denial of which, this respondent must therefore confine himself. He denies that he felt any solicitude whatever for the conviction of the traverser; other than the general wish natural to every friend of truth, decorum, and virtue, that persons guilty of such offences, as that of which the traverser stood indicted, should be brought to punishment, for the sake of example. He has no hesitation to acknowledge, that his indignation was strongly excited, by the atrocious and profligate libel which the traverser was charged with having written and published. This indignation, he believes, was felt by every virtuous and honorable man in the community, of every party, who had read the book in question, or become acquainted with its contents. How properly it was felt, will appear from the book itself, which this respondent has ready to produce to this honorable court; from the parts of it incorporated into the indictment now under consideration; and from some further extracts contained in the paper marked exhibit No. 6.

which this respondent prays leave to make part of this his answer. He admits, and it can never be to him a subject of self-reproach or a cause of regret, that he partook largely in this general indignation, but he denies that it in any manner influenced his conduct towards the traverser, which was regulated by a conscientious regard to his duty and the laws. He moreover contends, that a solicitude to procure the conviction of the traverser, however unbecoming his character as a judge, would not have been an offence, had he felt it; unless it had given rise to some misconduct on his part. Intentions and feelings, unless accompanied by actions, do not constitute crimes in this country; where the guilt or innocence of men is not judged of by their wishes and solicitudes, but by their conduct and its motives. And this respondent thinks it his duty, on this occasion, to enter his solemn protest against the introduction in this country, of those arbitrary principles, at once the offspring and the instruments of despotism, which would make "high crimes and misdemeanors" to consist in "rude and contemptuous expressions," in "vexatious interruptions of counsel," and in the manifestation of "indecent solicitude" for the conviction of a most notorious offender. Such conduct is no doubt, improper and unbecoming in any person, and much more so in a judge: but it is too vague, too uncertain, and too susceptible of forced interpretations, according to the impulse of passion or the views of policy, to be admitted into the class of punishable offences, under a system of law whose certainty and precision in the definition of crimes, is its greatest glory, and the greatest privilege of those who live under its sway.

In concluding his defence against those charges contained in the fourth article of impeachment, he declares, that his whole conduct in that trial, was regulated by a strict regard to the principles of law, and by an honest desire to do justice between the United

States and the party accused. He felt a sincere wish, on the one hand, that the traverser might establish his innocence, by those fair and sufficient means which the law allows; and a determination, on the other, that he should not, by subterfuges and frivolous pretences, sport with the justice of the country, and evade that punishment of which, if guilty, he was so proper an object. These intentions he is confident, were legal and laudable; and if, in any part of his conduct, he swerved from this line, it was an error of his judgment and not of his heart.

And the said respondent for plea to the said fourth article of impeachment, saith, that he is not guilty of any high crime and misdemeanor, as in and by the said fourth article is alleged against him, and this he prays, may be enquired of by this honorable court, in such manner as law and justice shall seem to require.

The fifth article of impeachment charges this respondent, with having awarded "a capias against the body of the said James Thompson Callender, indicted for an offence *not capital*, whereupon the said Callender was arrested and committed to *close* custody, contrary to law in that case made and provided."

This charge is rested, 1st, on the act of Congress of September 24th, 1789, entitled "an act to establish the judicial courts of the United States," by which it is enacted "that for any crime or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process, in the state where such offender may be found." And 2dly, on a law of the state of Virginia, which is said to provide "that upon *presentment* by any grand jury, of an offence *not capital*, the court shall order the clerk to issue a *summons* against the person or persons so offending, to appear and answer such presentment at the *next* court." It is contended, in support of this charge, that the act of Congress

above mentioned, made the state law the rule of proceeding, and that the state law was violated by issuing a capias against Callender, instead of a summons.

The first observation to be made on this part of the case is, that the date of the law of Virginia is not mentioned in the article. A very material omission! For it cannot be contended, that by the act of Congress in question, which was passed for establishing the laws of the United States, and regulating their proceedings; it was intended to render those proceedings dependent on all *future* acts of the state legislatures. The intention certainly was, to adopt, to a certain limited extent, the regulations existing in the states at the time of passing the act. Consequently, a law of Virginia, passed after this act, can have no operation on the proceedings under it. But by referring to the law of Virginia in question, it will be found to bear date on November 13th, 1792, more than three years after this act of Congress, by which it is said to have been adopted. But the omission of the date of this law of Virginia, is not the most material oversight which has been made in citing it. Its title is "An act directing the method of proceeding against free persons, charged with certain crimes," &c. and it enacts, section 28th, "That upon presentment made by the grand jury, of an offence not capital, the court shall order the clerk to issue a summons, or *other proper process*, against the person or persons so presented, to appear and answer at the next court." It will be observed that these words, "or other proper process," which leave it perfectly in the discretion of the court what process shall issue, provided it be such as is proper for bringing the offender to answer to the presentment, are omitted in this article of impeachment.

From these words it is perfectly manifest, that the law of Virginia, admitting it to apply, did not order a summons to be issued, but left it perfectly in the

discretion of the court to issue a summons, or such other process as they should judge proper. It is therefore, a sufficient answer to this article to say, that this respondent considered a capias as the proper process, and therefore ordered it to issue; which he admits that he did, immediately after the presentment was found against the said Callender, by the grand jury.

This he is informed, and expects to prove, has been the construction of this law by the courts of Virginia, and their general practice. Indeed it would be most strange, if any other construction or practice had been adopted. There are many offences not capital, which are of a very dangerous tendency, and on which very severe punishment is inflicted by the laws of Virginia; and to enact by law that in all such cases, however notorious or profligate the offenders might be, the courts should be obliged, after a presentment by a grand jury, to proceed against them by summons; would be to enact, that as soon as their guilt was rendered extremely probable, by the presentment of a grand jury, they should receive regular notice, to escape from punishment by flight or concealment.

It will also appear, as this respondent believes, by a reference to the laws and practice of Virginia, into which he has made all the enquiries which circumstances and the shortness of time allowed him for preparing his answer, would permit, that all the cases in which a summons is considered as the only proper process, are cases of petty offences, which on the presentment of a grand jury, are to be tried by the court in a summary way, without the intervention of a petit jury.—Therefore, these provisions had no application to the case of Callender, which could be no otherwise proceeded on than by indictment, and trial on the indictment by a petit jury.

It must be recollected that the act of Congress of September 24th, 1789, enacts, section 14, "that the courts of the United States, shall have power to issue writs of scire facias, habeas corpus, *and all other writs* not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of laws." Consequently, the circuit court, where the proceedings in question took place, had power to issue a capias against the traverser, on the presentment, unless the state law above mentioned governed the case, and contained something to restrain the issuing of that writ in such a case. This respondent contends, for the reasons above stated, that this state law neither applied to the case, nor contained any thing to prevent the issuing of a capias, if it had applied.

Thus it appears that this respondent, in ordering a capias to issue against Callender, decided correctly, as it certainly was his intention to do. But he claims no other merit than that of upright intention in this decision: for when he made the decision, he was utterly ignorant that such a law existed in Virginia; and declares that he never heard of it, till this article was reported by a committee of the House of Representatives, during the present session of Congress. This law was not mentioned on the trial either by the counsel or the traverser or by judge Griffin, who certainly had much better opportunities of knowing it than this respondent, and who, no doubt, would have cited it had they known it and considered it as applicable to the case. This respondent well knows that in a criminal view, ignorance of the law excuses no man in offending against it; but this maxim applies not to the decision of a judge; in whom ignorance of the law in general would certainly be a disqualification for this office, though not a crime; but ignorance of a particular act of assembly, of a state where he was an utter stranger,

must be considered as a very pardonable error; especially as the counsel for the prisoner to whose case that law is supposed to have applied, forebore or omitted to cite it; and as a judge of the state, always resident in it, and long conversant with its local laws, either forgot this law, or considered it as inapplicable.

Such is the answer, which this respondent makes to the fifth article of impeachment. If he erred in this case, it was through ignorance of the law, and surely, ignorance under such circumstances, cannot be a crime, much less a high crime and misdemeanor, for which he ought to be removed from his office. If a judge were impeachable for acting against law from ignorance only, it would follow, that he would be punished in the same manner for deciding against law wilfully, and for deciding against it through mistake. In other words, there would be no distinction between ignorance and design, between error and corruption.

And the said respondent, for plea to the said fifth article of impeachment, saith, that he is not guilty of any high crime and misdemeanor, as in and by the said fifth article is alleged against him; and this he prays, may be enquired of, by this honorable court, in such manner, as law and justice shall seem to them to require.

The sixth article of impeachment alleges, that this respondent, "with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial, during the term at which he, the said Callender was presented and indicted, contrary to the law in that case made and provided."

This charge also, is founded, 1st, on the act of Congress of Sept. 24th, 1789, abovementioned, which enacts, section 34, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise provide, shall be regarded as the rules of decision, in trials at *common law*,

in the courts of the United States, in cases where they apply," and 2ndly, on a law of the state of Virginia, which is supposed to provide, "that in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next preceding that, during which such presentment shall have been made." This law, it is contended, is made the rule of decision by the abovementioned act of Congress, and was violated by the refusal to continue the case of Callender till the next term.

In answer to this charge this respondent declares, that he was at the time of making the abovementioned decision, wholly ignorant of any such law of Virginia as that in question, that no such law was adduced or mentioned by the counsel of Callender, in support of their motion for a continuance; neither when they first made it, before this respondent sitting alone; nor when they renewed it, after judge Griffin had taken his seat in court: that no such law was mentioned by judge Griffin, who concurred in overruling the motion for a continuance and ordering on the trial; which he could not have done had he known that such a law existed, or considered it as applicable to the case; and that this respondent never heard of any such law, until the articles of impeachment now under consideration were reported, in the course of the present session of Congress, by a committee of the House of Representatives.

A judge is certainly bound to use all proper and reasonable means of obtaining a knowledge of the laws which he is appointed to administer; but after the use of such means, to overlook, misunderstand, or remain ignorant of some particular law, is at all times a very pardonable error. It is much more so in the case of a judge of the supreme court of the United States, holding a circuit court in a particular state, with which he is a stranger, and with the local laws of which he can have enjoyed but very imperfect oppor-

tunities of becoming acquainted. It was foreseen by Congress, in establishing the circuit courts of the United States, that difficulties and inconveniences must frequently arise from this source, and to obviate such difficulties it was provided, that the district judge of each state, who having been a resident of the state and a practitioner in its courts, had all the necessary means of becoming acquainted with its local laws, should form a part of the circuit court in his own state. The judge of the supreme court is expected, with reason, to be well versed in the general laws; but the local laws of the state form the peculiar province of the district judge, who may be justly considered as particularly responsible for their due observance. If in the case in question, this respondent overlooked or misconstrued any local law of the state of Virginia, which ought to have governed the case, it was equally overlooked and misunderstood, not only by the prisoner's counsel who made the motion, and whose peculiar duty it was to know the law and bring it into the view of the court, but also by the district judge, who had the best opportunities of knowing and understanding it, and in whom, nevertheless, this oversight or mistake is considered as a venal error, while in this respondent it is made the ground of a criminal charge.

This respondent further states, that after the most diligent and the most extensive enquiry which the time allowed for preparing this answer would permit, he can find no law of Virginia which expressly enacts, that "in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next succeeding that during which such presentment shall have been made." This principle he supposes to be an inference drawn by the authors of the articles of impeachment, from the law of Virginia mentioned in the answer to the preceding article, the law of November 15th, 1792, which provides

"that upon presentment made by the grand jury of an offence not capital, the court shall order the clerk to issue a summons, or other proper process, against the person or persons so presented, to appear and answer such presentment at the NEXT court." This law he conceives does not warrant the inference so drawn from it, because it speaks of *presentments* and not of *indictments*, which are very different things; and is, as he is informed, confined by practice and construction in the state of Virginia, to cases of small offences, which are to be tried by the court itself upon the presentment, without an indictment or the intervention of a petit jury. But for cases, like that of Callender, where an indictment must follow the presentment, this law made no provision. Further, the state laws are directed by the above mentioned act of Congress, to be the rule of decision in the courts of the United States, only "in cases where they apply." Whether they apply or not to a particular case, is a question of law, to be decided by the court where such case is pending, and an error in making the decision is not a crime, nor even an offence, unless it can be shewn to have proceeded from improper motives. This respondent is of opinion, that the law in question did not apply to the case of Callender, for the reasons stated above; and therefore that it would have been his duty to disregard it, even had it been made known to him by the counsel for the traverser.

And in the last place he contends, that the law of Virginia in question, is not adopted by the above mentioned act of Congress as the rule of decision, in such cases as that now under consideration. That act does indeed provide, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at *common law*, in the courts of the United States, in cases where they apply." But this provision, in his opinion,

can relate only to rights acquired under the state laws, which come into question *on* the trial; and not to forms of process or modes of proceeding, anterior or preparatory to the trial. Nor can it, as this respondent apprehends, have any application to indictments for offences against the statutes of the United States, which cannot with any propriety be called "trials at common law." It relates merely, in his opinion, to civil rights acquired under the state laws; which by virtue of this provision are, when they come in question in the courts of the United States, to be governed by the laws under which they accrued.

If in these opinions this respondent be incorrect, it is an honest error: and he contends that neither such an error in the construction of a law, nor his ignorance of a local state law which he had no opportunity of knowing, and of which the counsel for the party whose case it is supposed to have affected were equally ignorant, can be considered as an offence liable to impeachment, or to any sort of punishment or blame.

And for plea to the said sixth article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor as in and by the said article is alleged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The seventh article of impeachment relates to some conduct of this respondent in his judicial capacity, at a circuit court of the United States held at New-Castle, in the state of Delaware, in June 1800. The statement of this conduct made in the article is altogether erroneous; but if it were true, this respondent denies, that it contains any matter for which he is liable to impeachment. It alleges that "disregarding the duties of his office, he did descend from the dignity of a judge, and stoop to the level of an informer." This high offence consisted, according to

the article, 1st, " in refusing to discharge the grand jury although intreated by several of the said jury to do so," 2dly, in " observing to the said grand jury, after the said grand jury had regularly declared through their foreman, that they had found no bills of indictment, and had no presentments to make, that he the said Samuel Chase, understood ' that a highly seditious temper had manifested itself in the state of Delaware, among a certain class of people, particularly in New-Castle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was ————————.' 3dly, " in then checking himself as if sensible of the indecorum which he was committing." 4thly, in adding " that it might be assuming too much, to mention the name of this person; but it becomes your duty, gentlemen, to enquire diligently into this matter," or words to that effect. And 5thly, in authoritatively enjoining on the district attorney of the United States, with intention to procure the prosecution of the printer in question, the necessity of procuring a file of the papers to which he alluded, and by a strict examination of them to find some passage, which might furnish the ground work of a prosecution against the printer."

These charges amount in substance to this; that the respondent refused to discharge a grand jury on their request, which is every day's practice, and which he was bound to do, if he believed that the due administration of justice required their longer attendance; that he directed the attention of the grand jury to an offence against a statute of the United States, which he had been informed was committed in the district; and that he desired the district attorney to aid the grand jury, in their enquiries concerning the existence and nature of this offence. By these three acts, each of which it was his duty to perform, he is

alleged " to have degraded his high judicial functions, and tended to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare."

That this honorable court may be able to form correctly its judgment, concerning the transaction mentioned in this article, this respondent submits the following statement of it, which he avers to be true, and expects to prove.

On the 27th day of June, 1800, this respondent, as one of the associate justices of the supreme court of the United States, presided in the circuit court of the United States, then held at Newcastle, in and for the district of Delaware, and was assisted by Gunning Bedford, esq. then district judge of the United States, for that district. At the opening of the court on that day, this respondent according to his duty and his uniform practice, delivered a charge to the grand jury, in which he gave in charge to them several statutes of the United States, and among others, an act of Congress, passed July 14th, 1798, entitled " An act in addition to the act for the punishment of certain crimes against the United States," and commonly called the " sedition law." He directed them to enquire concerning any breaches of those statutes, and especially of that commonly called the sedition law, within the district of Delaware.

On the same day, before the usual hour of adjournment, the grand jury came into court, and informed the court that they had found no indictment or presentment, and had no business before them, for which reason they wished to be discharged. This respondent replied, that it was earlier than the usual hour of discharging a grand jury; and that business might occur during the sitting of the court. He also asked them if they had no information of publications within the district, that came under the sedition law, and added, that he had been informed, that there was a

paper called the "Mirror," published at Wilmington, which contained libellous charges against the government and President of the United States: that he had not seen that paper, but it was their duty to enquire into the subject; and if they had not turned their attention to it, the attorney for the district would be pleased to examine a file of that paper, and if he found any thing that came within the sedition law, would lay it before them."—This is the substance of what the respondent said to the grand jury on that occasion, and he believes nearly his words; on the morning of the *next day*, they came into court and declared that they had no presentments or indictments to make, on which they were immediately discharged. The whole time therefore, for which they were detained, was twenty four hours, far less than is generally required of grand juries.

In these proceedings, this respondent acted according to his sense of what the duties of his office required. It certainly was his duty to give in charge to the grand jury, all such statutes of the United States as provided for the punishment of offences, and among others, that called the sedition act; into all offences against which act, while it continued in force, the grand jury were bound by their oaths to enquire. In giving it in charge, together with the other acts of Congress for the punishment of offences, he followed moreover the example of the other judges of the supreme court, in holding their respective circuit courts. He also contends, and did then believe, that it was his duty, when informed of an offence, which the grand jury had overlooked, to direct their attention towards it, and to request for them, and even to require if necessary, the aid of the district attorney in making their enquiries. In thus discharging what he conceives to be his duty, even if he committed an error in so considering it, he denies that he committed or could commit any offence whatever.

With respect to the remarks which he is charged by this article with having made to the grand jury, relative to "a highly seditious temper, which he had understood to have manifested itself in the state of Delaware, among a certain class of people, particularly in Newcastle county, and more especially in the town of Wilmington," and relative to "a most seditious printer, residing in Wilmington, unrestrained by any principle of virtue, and regardless of social order;" this respondent does not recollect or believe, that he made any such observations. But if he did make them, it could not be improper in him to tell the jury that he had received such information, if in fact he had received it; which was probably the case, though he cannot recollect it with certainty at this distance of time. That this information, if he did receive it, was correct, so far as it regarded the printer in question, will fully appear from a file of the paper called the "Mirror of the Times," &c. published at Wilmington, Delaware, from February 5th, to March 19th, 1800, inclusive, which he has lately obtained, and is ready to produce to this honorable court when necessary, and some extracts from which are contained in the exhibits severally marked No. 7, which he prays leave to make part of this his answer.

And for plea to the said seventh article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor, as in and by the said seventh article is alleged against him, and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The eighth article of impeachment charges, that this respondent, "disregarding the duties and dignity of his official character did, at a circuit court for the district of Maryland, held at Baltimore, in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled, on the

matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland, against their state government and constitution," and also that this respondent, "under pretence of exercising his judicial right to address the grand jury as aforesaid, did endeavor to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States, by delivering opinions which were, at that time and as delivered by him, highly indecent, extra judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan."

In answer to this charge this respondent admits, that he did, as one of the associate justices of the supreme court of the United States, preside in a circuit court held at Baltimore in and for the district of Maryland, in May 1803, and did then deliver a charge to the grand jury, and express in the conclusion of it some opinions as to certain public measures, both of the government of Maryland and of that of the United States. But he denies that in thus acting, he disregarded the duties and dignity of his judicial character, perverted his official right and duty to address the grand jury, or had any intention to excite the fears or resentment of any person whatever, against the government and constitution of the United States or of Maryland. He denies that the sentiments which he thus expressed, were "intemperate and inflammatory," either in themselves or in the manner of delivering; that he did endeavor to excite the odium of any person whatever against the government of the United States, or did deliver any opinions which were in any respect indecent, or which had any tendency to prostitute his judicial character, to any low or improper purpose. He denies that he

did any thing that was unusual, improper or unbecoming in a judge, or expressed any opinions, but such as a friend to his country, and a firm supporter of the governments both of the state of Maryland and of the United States, might entertain. For the truth of what he here says, he appeals confidently to the charge itself; which was read from a written paper now in his possession ready to be produced. A true copy of all such parts of this paper as relate to the subject matter of this article of impeachment, is contained in the exhibit marked No. 8, which he prays leave to make part of this his answer. That part of it which relates to the article now under consideration is in these words; "You know, gentlemen, that our state and national institutions were framed to secure to every member of the society *equal* liberty and *equal* rights; but the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges, and the *recent* change in our state constitution by the establishing *universal* suffrage, *and* the further alteration that is contemplated in our state judiciary, (if adopted) will in my judgment take way *all security for property and personal liberty*. The independence of the national judiciary is already shaken to its foundation; and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed, if the bill for the abolishing the two supreme courts, should be ratified by the next general assembly. The change of the state constitution by allowing universal suffrage, will in my opinion certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a *mobocracy*, the worst of all possible governments.

"I can only lament that the *main pillar* of our state constitution has been thrown down, by the establishment of *universal suffrage*. By this shock *alone*, the whole building totters to its base, and will crumble in-

to ruins before *many* years elapse, unless it be *restored* to its original state. If the independency of your state judges, which your bill of rights wisely declares 'to be essential to the impartial administration of justice, and the great security to the rights and liberties of the people,' shall be taken away, by the ratification of the bill passed for that purpose, it will precipitate the destruction of your whole state constitution, and there will be nothing left in it, worthy the care or support of freemen."

Admitting these opinions to have been incorrect and unfounded, this respondent denies that there was any law which forbid him to express them, in a charge to a grand jury; and he contends that there can be no offence, without the breach of some law. The very essence of despotism consists, in punishing acts which, at the time when they were done, were forbidden by no law. Admitting the expression of political opinions by a judge, in his charge to a jury, to be improper and dangerous; there are many improper and very dangerous acts, which not being forbidden by law cannot be punished. Hence the necessity of new penal laws; which are from time to time enacted for the prevention of acts not before forbidden, but found by experience to be of dangerous tendency. It has been the practice in this country, ever since the beginning of the revolution, which separated us from Great Britain, for the judges to express from the bench, by way of charge to the grand jury, and to enforce to the utmost of their ability, such political opinions as they thought correct and useful. There have been instances in which the legislative bodies of this country, have recommended this practice to the judges; and it was adopted by the judges of the supreme court of the United States, as soon as the present judicial system was established. If the legislature of the United States considered this practice as mischievous, dangerous, or liable to abuse, they might have for-

bidden it by law; to the penalties of which, such judges as might afterwards transgress it, would be justly subjected. By not forbidding it, the legislature has given to it an implied sanction; and for that legislature to punish it now by way of impeachment, would be to convert into a crime, by an ex post facto proceeding, an act which when it was done and at all times before, they had themselves virtually declared to be innocent. Such conduct would be utterly subversive of the fundamental principles on which free government rests; and would form a precedent for the most sanguinary and arbitrary persecutions, under the forms of law.

Nor can the incorrectness of the political opinions thus expressed, have any influence in deciding on the guilt or innocence of a judge's conduct in expressing them. For if he should be considered as guilty or innocent, according to the supposed correctness or incorrectness of the opinion, thus expressed by him, it would follow, that error in political opinion however honestly entertained, might be a crime; and that a party in power might, under this pretext, destroy any judge, who might happen in a charge to a grand jury, to say something capable of being construed by them, into a political opinion adverse to their own system.

There might be some pretence for saying, that for a judge to utter seditious sentiments, with intent to excite sedition, would be an impeachable offence: although such a doctrine would be liable to the most dangerous abuses; and is hostile to the fundamental principles of our constitution, and to the best established maxims of our criminal jurisprudence. But admitting this doctrine to be correct, it cannot be denied that the seditious intention must be proved clearly, either by the most necessary implication from the words themselves, or by some overt acts of a seditious nature connected with them. In the present case no

such acts are alleged, but the proof of a seditious intent must rest on the words themselves. By this rule this respondent is willing to be judged. Let the opinions which he delivered be examined; and if the members of this honorable court can lay their hands on their hearts, in the presence of God, and say, that these opinions are not only erroneous but seditious also, and carry with them internal evidence of an intention in this respondent to excite sedition, either against the state or general government, he is content to be found guilty.

In making this examination, let it be borne in mind, that to oppose a depending measure, by endeavoring to convince the public that it is improper, and ought not to be adopted; or to promote the repeal of a law already past, by endeavoring to convince the public, that it ought to be repealed, and that such men ought to be elected to the legislature as will repeal it; to attempt in fine, the correction of public measures, by arguments tending to shew their improper nature, or destructive tendency; never has been or can be considered as sedition, in any country, where the principles of law and liberty are respected; but is the proper and usual exercise of that right of opinion and speech, which constitutes the distinguishing feature of free government. The abuse of this privilege, by writing and publishing as facts, malicious falsehoods, with intent to defame, is punishable as libellous, in the courts having jurisdiction of such offences; where the truth or falsehood of the facts alleged, and the malice or correctness of the intention, form the criterion of guilt and innocence. But the character of libellous, much less of seditious, has never been applied to the expression of opinions concerning the tendency of public measures, or to arguments urged for the purpose of opposing them, or of effecting their repeal. To apply the doctrine of sedition or of libels to such cases, would instantly destroy all liberty of speech,

subvert the main pillars of free government, and convert the tribunals of justice into engines of party vengeance. To condemn a public measure, therefore, as pernicious in its tendency; to use arguments for proving it to be so; and to endeavor by these means to prevent its adoption, if still depending, or to procure its repeal in a regular and constitutional way, if it be already adopted; can never be considered as sedition, or in any way illegal.

The first opinion expressed to the grand jury on the occasion in question, by this respondent, was, that "the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges; and the recent change in our state constitution, by establishing universal suffrage; and the further alteration that was then contemplated in our state judiciary, if adopted;" would, in the judgment of this respondent, "take away all security for property and personal liberty." That is, "these three measures, if the last of them, which is still depending, should be adopted, will, in my opinion, form a system whose pernicious tendency must be, to take away the security for our property and our personal liberty," which we have hitherto derived from the salutary restrictions laid by the authors of our constitution on the right of suffrage, and from the present constitution of our courts of justice." What is this but an argument to persuade the people of Maryland to reject the alterations in their state judiciary which were then proposed; which this respondent as a citizen of that state had a right to oppose; and the adoption of which depended on a legislature then to be chosen? If this be sedition, then will it be impossible to express an opinion opposite to the views of the ruling party of the moment, or to oppose any of their measures by argument, without becoming subject to such punishment as they may think proper to inflict.

The next opinion is, that "the independence of the national judiciary was already shaken to its foundation,

and that the virtue of the people alone could restore it." In other words, "The act of Congress for repealing the late circuit court law, and vacating thereby the offices of the judges, has shaken to its foundation the independence of the national judiciary, and nothing but a change in the representation of Congress, which the return of the people to correct sentiments alone can effect, will be sufficient to produce a repeal of this act, and thereby restore to its former vigor, the part of the federal constitution, which has been thus impaired."

This is the obvious meaning of the expression; and it amounts to nothing more than an argument in favor of that change, which this respondent then thought and still thinks to be very desirable; an argument, the force of which as a patriot he might feel, and which as a free man he had a right to advance.

The next opinion is, that "the independence of the judges of the state of Maryland, would be entirely destroyed if the bill for abolishing the two supreme courts should be ratified by the next general assembly." This opinion, however incorrect it may be, seems to have been adopted by the people of Maryland, to whom this argument against the bill in question was addressed: for at the next session of the legislature this bill, which went to change entirely the constitutional tenure of judicial office in the state, and to render the subsistence of the judges dependent on the legislature, and their continuance in office on the executive, was abandoned by common consent.

All the other opinions expressed by this respondent, as above mentioned, bear the same character with those already considered. They are arguments addressed to the people of Maryland, for the purpose of dissuading them from the adoption of a measure then depending; and of inducing them, if possible, to restore to its original state, that part of their constitution relating to the right of suffrage, by a repeal of the law, which had been made for its alteration.

Such were the objects of this respondent in delivering those opinions, and he contends that they were fair, proper, and legal objects, and that he had a right to pursue them in this way: a right sanctioned by the universal practice of this country, and by the acquiescence of its various legislative authorities. Such, he contends, is the true and obvious meaning of the opinions which he delivered, and which he believes to be correct. It is not now necessary to enquire into their correctness; but, if incorrect, he denies that they contain any thing seditious, or any evidence of those improper intentions which are imputed to him by this article of impeachment. He denies that in delivering them to the grand jury, he committed any offence, infringed any law, or did any thing unusual, or heretofore considered in this country as improper or unbecoming in a judge. If this article of impeachment can be sustained on these grounds, the liberty of speech on national concerns, and the tenure of the judicial office under the government of the United States, must hereafter depend on the arbitrary will of the House of Representatives and the Senate, to be declared on impeachment, after the acts are done, which it may at any time be thought necessary to treat as high crimes and misdemeanors.

And the said Samuel Chase, for plea to the said eighth article of impeachment, saith, that he is not guilty of any high crime and misdemeanor, as in and by the said eighth article is alleged against him, and this he prays may be inquired of by this honorable court, in such manner as law and justice shall seem to them to require.

This respondent has now laid before this honorable court, as well as the time allowed him would permit, all the circumstances of his case, with an humble trust in Providence, and a consciousness that he has discharged all his *official* duties with justice and impartiality, to the best of his knowledge and abilities; and,

that intentionally he hath committed no crime or misdemeanor, or any violation of the constitution or laws of his country. Confiding in the impartiality, independence and integrity of his judges, and that they will patiently hear, and conscientiously determine this case, without being influenced by the spirit of party, by popular prejudice, or political motives, he cheerfully submits himself to their decision.

If it shall appear to this honorable court, from the evidence produced, that he hath acted in his *judicial* character with wilful injustice or partiality, he doth not wish any favor; but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him.

If any part of his official conduct shall appear to this honorable court, *stricti juris*, to have been *illegal*, or to have proceeded from *ignorance* or *error* in judgment; or if any part of his conduct shall appear, although not illegal, to have been irregular or improper, but not to have flown from a depravity of heart, or any unworthy motive, he feels confident that this court will make allowance for the imperfections and frailties incidental to man.

He is satisfied, that every member of this tribunal will observe the principles of humanity and justice, and will presume him innocent, until his guilt shall be established by legal and credible witnesses, and will be governed in his decision, by the moral and christian rule of rendering that justice to this respondent, which he would wish to receive.

This respondent now stands not merely before an earthly tribunal, but also before that awful Being whose presence fills all space, and whose all-seeing eye more especially surveys the temples of justice and religion. In a little time, his accusers, his judges, and himself, must appear at the bar of Omnipotence, where the secrets of all hearts shall be disclosed, and every human being shall answer for his deeds done in

the body, and shall be compelled to give evidence against himself, in the presence of an assembled universe. To his Omniscient Judge, at that awful hour, he now appeals for the rectitude and purity of his conduct, as to all the matters of which he is this day accused.

He hath now only to adjure each member of this honorable court, by the living GOD, and in his holy name, to render impartial justice to him, according to the constitution and laws of the United States. He makes this solemn demand of each member, by all his hopes of happiness in the world to come, which he will have voluntarily renounced by the path he has taken; if he shall wilfully do this respondent injustice, or disregard the constitution or laws of the United States, which he has solemnly sworn to make the rule and standard of his judgment and decision.

Mr. *Randolph*, on behalf of the Managers, requested time to consult the House of Representatives, and likewise to be furnished with a copy of the answer of judge Chase, for the purpose of making a replication to it.

The *President* said the Senate would take the request into consideration, and make known to the House of Representatives such order as should be taken thereon.

Whereupon the Senate, at the suggestion of the President, retired to their legislative apartment.

On *Wednesday*, the 6th instant, the House of Representatives received a copy of the foregoing answer, which was referred to the Managers. On the same day Mr. Randolph reported a replication to the answer, which was immediately taken into consideration. Several motions were made, and rejected, after a short debate, to soften the style; when the replication, as reported, was adopted, Yeas 77, Nays 34. Whereupon, it was resolved that the Managers be instructed to proceed to maintain the said replication at

the bar of the Senate, at such time as shall be appointed by the Senate.

THURSDAY, *February* 7, 1805.

The court was opened about 2 o'clock.

Present, the Managers—and Mr. Hopkinson, of counsel for Mr. Chase.

Mr. *Randolph*, on behalf of the Managers, read the replication of the House of Representatives, to the answer of Samuel Chase, as follows:

Replication by the House of Representatives of the United States, to the answer of Samuel Chase, one of the associate justices of the supreme court of the United States, to the articles of impeachment exhibited against him by the said House of Representatives.

The House of Representatives of the United States have considered the answer of Samuel Chase, one of the associate justices of the supreme court of the United States, to the articles of impeachment against him, by them exhibited, in the name of themselves and of all the people of the United States, and observe,

That the said Samuel Chase hath endeavored to cover the high crimes and misdemeanors laid to his charge, by evasive insinuations and misrepresentation of facts; that the said answer does give a gloss and coloring utterly false and untrue, to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution, and injustice, of which he stands accused; and the House of Representatives, in full confidence of the truth and justice of their accusation, and of the necessity of bringing the said Samuel Chase to a speedy and exemplary

punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives, and to vindicate the honor of the nation, do aver their charge against the said Samuel Chase to be true, and that the said Samuel Chase is guilty in such manner as he stands impeached: and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose.

Signed by order, and in behalf of the said House.

NATH. MACON, *Speaker.*

ATTEST,

JOHN BECKLEY, *Clerk.*

Mr. *Hopkinson* requested a copy of the replication, which, the President replied, would be furnished by the secretary.

Mr. *Breckenridge* moved a resolution to the following effect:

That the secretary be directed to inform the House of Representatives, that the Senate will to-morrow, at 12 o'clock, proceed with the trial of Samuel Chase; which was agreed to without a dissenting voice....34 members voting for it.

Whereupon, the Senate withdrew to their legislative apartment.

FRIDAY, *February* 8, 1805.

The court opened precisely at 12 o'clock.

Present, the Managers, and House of Representatives, in committee of the whole:—and,

Mr. Chase, attended by his counsel, Messrs. Martin, Harper, Hopkinson, and Key.

The cryer having, agreeably to a prescribed form, notified all those concerned to come forward and make good the charges exhibited against Samuel Chase,

Mr. *Randolph*, the leading Manager, requested that the witnesses on the part of the prosecution, might be called, to ascertain who were present.

They were accordingly called, to the number of twenty-four, as follows:—

Those who answered are marked (*p*)—and those absent (*a*.)

Alexander James Dallas,	*p.*	Philip Stewart,	*a.*
William Lewis,	*p.*	John Thomson Mason,	*p.*
William Rawle,	*p.*	Samuel H. Smith,	*p.*
William S. Biddle,	*p.*	Thomas Hall,	*a.*
Edward Tilghman,	*p.*	John Taylor,	*p.*
George Read,	*p.*	George Hay,	*p.*
James Lea,	*a.*	Philip Norborne Nicholas,	*a.*
John Crow,	*a.*	William Wirt,	*p.*
Risdon Bishop,	*a.*	John Harvie,	*a.*
John Montgomery,	*p.*	Meriwether Jones,	*a.*
John Stephen,	*p.*	John Heath,	*p.*
Aquila Hall,	*a.*	James Pleasants,	*a.*

Mr. *Randolph* observed, that various considerations, which it was unnecessary to detail, induced him, on behalf of the Managers, to move a postponement of the trial till to-morrow, when they hoped to be prepared to proceed with it.

Mr. *Harper* said, that on behalf of judge Chase, he would not object to the motion.

The *President* informed the Managers, that the Senate acceded to their request, and added that the Senate would attend to-morrow at 12 o'clock, for the purpose of proceeding with the trial.

At the request of Mr. Harper, the witnesses on the part of judge Chase were called over, to the number of forty, as follows:—

Those present are marked (*p*)—and those absent (*a.*)

William Marshall,	*a.*	John A. Chevalier,	*p.*
David M. Randolph,	*p.*	Robert Gamble,	*a.*
Edmund Randolph,	*a.*	John Marshall,	*p.*

John Baffet,	*p.*	Samuel P. Moore,	*p.*
Cyrus Griffin,	*ſick.*	William C. Frazier,	*p.*
David Robertſon,	*p.*	Edward Tilghman,	*p.*
J. C. Barrett,	*dead.*	Wm. Meredith,	*p.*
John Hopkins,	*not found.*	Jared Ingerſoll,	*p.*
Philip Gooch,	*not found.*	Samuel Wheeler,	*not found.*
William Minor,	*not found.*	Samuel Ewing,	*p.*
James Winchester,	*p.*	Walter Dorſey,	*p.*
Philip Moore,	*a.*	James P. Boyd,	*p.*
Cornelius Comegys,	*a.*	Nicholas Brice,	*p.*
John Purviance,	*p.*	Wm. M. Mechin,	*p.*
Thomas Chaſe,	*p.*	William H. Wynder,	*p.*
John Stewart,	*a.*	William Gwyn,	*p.*
William Rawle,	*p.*	William J. Govane,	*p.*
Gunning Bedford,	*p.*	Edward J. Coale,	*a.*
Nicholas Vandyke,	*p.*	John Hall, jun.	*p.*
Archibald Hamilton,	*p.*	Thomas Carpenter.	*p.*

Whereupon the court rose.

SATURDAY, *February* 9, 1805.

The court was opened precisely at 12 o'clock.

Present, the Managers, attended by the House of Representatives in committee of the whole; and *Judge Chase*, attended by his counsel, as mentioned in the proceedings of yesterday.

At a quarter after 12 o'clock, Mr. *Randolph*, on behalf of the Managers, opened the impeachment, as follows:

Mr. *President*,

It becomes my duty to open this cause on behalf of the proſecution. From this duty, however incompetent I feel myſelf to its performance, at all times, and more especially at this time, as well from the very ſhort period which has been allowed us to conſider the long and elaborate plea of the reſpondent, as from the ſevere preſſure of diſeaſe, it does not become me to ſhrink. The ſtation in which I have been placed calls for the

discharge of an important public trust at my hands. It shall be performed to the best of my ability, inadequate as I know that ability to be. When I speak of the short period which has been allowed us, I hope not to be understood as expressing, on our part, any dissatisfaction at the course which has been pursued, or any wish to prolong the time which has been allotted for trial. We are sensible of a disposition in this honorable court to grant us every indulgence which we ought to ask, and when their attention is called to the precipitate hurry of our preparation, it is only to offer, on behalf of an individual, perhaps a weak apology for the weak defence which he is about to make of the cause confided to his care. A desire for the furtherance of justice and the avoidance of delay, but, above all, an unshaken conviction that we stand on impregnable ground, induce us on this short notice to declare that we are ready to substantiate our accusation, to prove that the respondent is guilty in such manner as he stands impeached.

It is a painful but indispensible task which we are called upon to perform:—to establish the guilt of a great officer of government, of a man, who, if he had made a just use of those faculties which God and Nature bestowed upon him, would have been the ornament and benefactor of his country, would have rendered her services as eminent and useful as he has inflicted upon her outrages and wrongs deep and deadly. A character endowed by nature with some of her best attributes, cultivated by education, placed by his country in a conspicuous station, invested with authority whose righteous exercise would have rendered him a terror to the wicked, whilst it endeared him to the wise and good:—such a character, presented to the nation in the light in which he now stands, and in which his misdeeds have made it our duty to bring him forward, forms one of the saddest spectacles which can be offered to the public eye. Base is that heart which could triumph over him,

I will now proceed to state the principal points on which we mean to rely, and which we expect to establish by the clearest evidence. In doing this I shall be necessarily led to notice many of the leading statements of the respondent's answer. We will begin with the first article. [Here Mr. R. read that article.] The answer to the first of these charges is by evasive insinuation and misrepresentation, by an attempt to wrest the accusation from its true bearing, the manner and time of delivering the opinion, and the intent with which it was delivered, to the correctness of the opinion itself, which is not the point in issue. And here permit me to remark, that if the Managers of this impeachment were governed only by their own conviction of the course which they ought, necessarily, to pursue, and not by the high sense of duty which they owe to their eminent employers, they would have felt themselves justified in resting their accusation on the admissions of the respondent himself. It is not for the opinion itself, that the respondent is impeached; it is for a daring inroad upon the criminal jurisprudence of his country, by delivering that opinion at a time and in a manner (in writing) before unknown and unheard of. The criminal intent is to be inferred from the boldness of the innovation itself, as well as from other overt acts charged in this article. The admission of the respondent ought to secure his conviction on this charge. He acknowleges that he did deliver an opinion, *in writing*, on the question of law (which it was the right and duty of the jury to determine, as well as the fact) *before* counsel had been heard in defence of John Fries, the prisoner. I must beg the assistance of one of the gentlemen with whom I am associated, to read this part of the answer. [Mr. Clark accordingly read the reply of Mr. Chase to this charge.] We charge the respondent with a gross departure from the forms, and a flagrant outrage upon the substance of criminal justice, in delivering a

written, prejudicated opinion on the case of Fries, tending to bias the minds of the jury against him before counsel had been heard in his defence. The respondent (page 33, of the answer) admits the fact, for he knew that we are prepared to prove it. But he artfully endeavors to shift the argument from the real point in contest, to the soundness of the opinion itself, which, however questionable (and of its incorrectness I entertain no doubt) it is not our object, at this time, to examine. For the truth of this opinion, and, as it would seem, for the propriety of this proceeding, the respondent takes shelter under precedent. He tells you, sir, this doctrine had been repeatedly decided on solemn argument and deliberation, twice in the same court, and once in that very case.—What is this, but a confession, that he himself hath been the first man to venture on so daring an innovation on the forms of our criminal jurisprudence? To justify himself for having given a written opinion *before* counsel had been heard for the prisoner, he resorts to the example set by his predecessors, who had delivered the customary verbal opinion, after solemn argument and deliberation. And what do these repeated arguments and solemn deliberations prove, but that none of his predecessors ever arrogated to themselves the monstrous privilege of breaking in upon those sacred institutions, which guard the life and liberty of the citizen from the rude inroads of powerful injustice? The learned and eminent judges, to whose example he appeals, for justification, decided *after*, and not *before* a hearing. They exercised the acknowledged privilege of the bench in giving an opinion to the jury on the question of law, after it had been fully argued by counsel, on both sides. They never attempted, by previous and written decisions, to wrest from the jury their undeniable right, of deciding upon the law as well as the fact, necessarily involved in a general verdict, to usurp this decision to themselves, or to prejudice the minds

of the jurors against the defence. I beg this honorable court never to lose sight of the circumstance, that this was a *criminal* trial, for a *capital* offence, and that the offence charged was *treason*. The respondent also admits, that the counsel for Fries, not meaning to contest the truth of the facts charged in the indictment, rested their defence altogether upon the law, which he declared to have been settled in the cases of Vigol and Mitchel: a decision which, although it might be binding on the court, the jury were not obliged to respect, and which the counsel had a right to controvert before them, the sole judges, in a case of that nature, both of the *law* and the *fact*. I do not deny the right of the court to explain their sense of the law, to the jury, after counsel have been heard; but I do deny that the jury are bound by such exposition.—If they verily believed that the overt acts charged in the indictment, did not amount to treason, they could not without a surrender of their consciences into the hands of the court, without a flagrant violation of all that is dear and sacred to man, bring in a verdict of Guilty. I repeat that in such a case the jury are not only the sole judges of the law, but that where their verdict is favorable to the prisoner, they are the judges without appeal. In civil cases, indeed, the verdict may be set aside and a new trial granted—but in a criminal prosecution, the verdict, if not guilty, is final and conclusive. It is only when the finding of the jury is unfavorable to the prisoner, that the humane provisions of our law, always jealous of oppression when the life, or liberty of the citizen is at stake, permits the verdict to be set aside, and a new trial granted to the unhappy culprit. When I concede the right of the court to explain the law to the jury in a criminal, and especially in a capital case, I am penetrated with a conviction that it ought to be done, if at all, with great caution and delicacy. I must beg leave to take, before this honorable court, what appears to my

unlettered judgment, to be a strong and obvious distinction. There is, in my mind, a material difference between a naked definition of law, the application of which is left to the jury, and the application by the court, of such definition to the particular case, upon which the jury are called upon to find a general verdict. Surely, there is a wide and evident distinction between an abstract opinion upon a point of law, and an opinion applied to the facts admitted by the party accused, or proven against him. But it is alleged, on behalf of the respondent, that the law in this case was settled, and upon this he rests his defence. Will it be pretended by any man that the law of treason is better established than the law of murder? What is treason as defined by the constitution? Levying war against the United States, or adhering to their enemies, giving them aid and comfort. What is murder? Killing with malice aforethought, a definition at least as simple and plain as the other. And because what constitutes murder has been established and settled through a long succession of ages and adjudications, has any judge for that reason, been ever daring enough to assert that counsel should be precluded from endeavoring to convince the jury that the overt acts, charged in the indictment, did not amount to murder? Is a court authorised to say, that because killing with deliberate malice is murder, therefore the act of killing, admitted by the prisoner's counsel, or established by evidence, was a killing with malice prepense, and did constitute murder? I venture to say that an instance cannot be adduced, familiar as the definition of murder is even to the most ignorant, numerous as have been the convictions for that atrocious crime, where counsel have been deprived of their unquestionable right to address the jury on the law, as well as on the fact. Much less can an instance be produced, in any trial for a capital offence, where they have found themselves anticipated in the question of law by a written opini-

on, to be taken by the jury out of court, as the landmark by which their verdict is to be directed. I have always understood, that, even in a civil case, when the jury carried out with them a written paper, relating to the matter in issue, and which was not offered, or permitted to be given in evidence to them, it was sufficient to vitiate their verdict, and good ground for a new trial. This written opinion of the court delivered previous to a hearing of the cause, is a novelty to our laws and usages. It would be reprehensible in any case, but in a criminal prosecution, for a capital offence, and that offence *treason*, (where, above all, oppression and arbitrary proceedings on the part of courts are most to be dreaded and guarded against) it cannot be too strongly reprobated, or too severely punished.

What would be said of a judge who in a trial for murder, where the facts were admitted (or proved) should declare from the bench, that whatever argument counsel had to offer, in relation to the facts, may be addressed to the jury, but that they should not attempt to convince the jury that such facts came not within the law, did not amount to murder, but that every thing which they had to say upon the question of law, should be addressed to the court, and to the court only. Can you figure to yourselves a spectacle more horrible?

We are prepared to prove, what the respondent has in part admitted, that he "restricted the counsel of Fries from citing such English authorities as they believed apposite, and certain statutes of the United States, which they deemed material to their defence:" that the prisoner was debarred by him, from his constitutional privilege of addressing the jury, through his counsel, on the law, as well as the fact, involved in the verdict which they were required to give—and that he attempted to wrest from the jury their undeniable right to hear argument, and, consequently, to

determine upon the question of law which in a criminal case it was their sole and unquestionable province to decide. These last charges (except so far as relates to the laws of the United States) are impliedly admitted by the respondent. He confesses that he would not permit the prisoner's counsel to cite certain cases, "because they could not inform but might deceive and mislead the jury." Mr. President, it is the noblest trait in this inestimable trial, that in criminal prosecutions, where the verdict is general, the jury are the sole judges, and where they acquit the prisoner, the judges, without appeal, both of law and fact. And what is the declaration of the respondent but an admission that he wished to take from the jury their indisputable privilege to hear argument and determine upon the law, and to usurp to himself that power, which belonged to them, and to them only? It is one of the most glorious attributes of jury trial, that in criminal cases (particularly such as are capital) the prisoner's counsel may (and they often do) attempt "to deceive and mislead the jury." It is essential to the fairness of the trial, that it should be conducted with perfect freedom. It is congenial to the generous spirit of our institutions to lean to the side of an unhappy fellow creature, put in jeopardy, of limb, or life, or liberty. The free principles of our governments, individual and federal, teach us to make every humane allowance in his favor, to grant him with a liberality, unknown to the narrow and tyrannous maxims of most nations, every indulgence not inconsistent with the due administration of justice. Hence, a greater latitude is allowed to the accused, than is permitted to the prosecutor. The jury, upon whose verdict the event is staked, are presumed to be men capable of understanding what they are called upon to decide, and the attorney for the state, a gentleman learned in his profession, capable of detecting and exposing the attempts of the opposite counsel to mislead and deceive. There is more

over the court, to which, in cases of difficulty, recourse might be had. But what indeed is the difficulty arising from the law in criminal cases, for the most part? What is to hinder an honest jury from deciding, especially after the aid of an able discussion, whether such an act was a killing with malice prepense, or such other overt acts set forth in an indictment, constituted a levying war against the United States—and to what purpose has treason been defined by the constitution itself, if overbearing arbitrary judges are permitted to establish among us the odious and dangerous doctrine of constructive treason? The acts of Congress which had been referred to on the former trial, but which the respondent said he would not suffer to be cited again, tended to shew that the offence committed by Fries did not amount to treason. That it was a misdemeanor, only, already provided for by law and punishable with fine and imprisonment. The respondent indeed denies this part of the charge, but he justifies it even (as he says) if it be proved upon him. And are the laws of our own country (as well as foreign authorities) not to be suffered to be read in our courts, in justification of a man whose life is put in jeopardy!

I now proceed to the second article—the case of Basset, whose objection to serve on Callender's jury was over-ruled by the judge, who stands arraigned before this honorable court. In the 30th page of the respondent's answer it is stated, that a new trial was granted to Fries, "*upon the ground (as this respondent understood and believes) that one of the jurors, after he was summoned, but before he was sworn, had made some declaration unfavorable to the prisoner.*" It will be remembered that both the trials of Fries preceded that of Callender. Upon what principle then, could the respondent declare Basset a good juryman, when he was apprized of the previous decision in the case of Fries, by his brother judge, whom he professes to hold in such high reverence, and by whose decision,

on his own principles, he must have held himself bound. For surely the same exception to a juryman, which would furnish ground for a new trial, ought to be a cause of setting aside such juror, if it be taken previous to his being sworn.

From the respondent's own shewing [page 51, of the answer] it appears, that the question put to the jurymen generally, and to Basset among others, was, whether they "had formed *and* delivered any opinion upon the subject matter then to be tried, or concerning the charges contained in the indictment." And here let me refer the court to the question which the respondent put to the jurors in the case of Fries, [page 45.] It was, "whether they had ever formed, *or* delivered any opinion as to his guilt, or innocence, or that he ought to be punished?" How is this departure from the respondent's own practice, this inconsistency with himself to be reconciled? In the one case the question is put in the disjunctive; "have you formed *or* delivered?" In the other, it is in the conjunctive, "formed *and* delivered;" besides other material difference in the terms and import of the two questions. Wherefore, I repeat, this contradiction of himself? But, Mr. President, we shall be prepared to prove that the words "*subject matter then to be tried*" were not comprised in the question propounded to Basset, or to any of the other jurors. The question was, as will be shewn in evidence, "have you ever formed *and* delivered any opinion *concerning the charges contained in the indictment*?" And it is remarkable that the whole argument of the respondent upon this point, goes to justify the question which was *actually* put, and which he probably expected we should prove that he did put, rather than that which he himself declares to have been propounded by him. Such a question must necessarily have been answered in the negative. Basset could never have seen the indictment: and although his mind might have been made

up on the *book*, whatever opinion he might have formed and delivered as to the guilt of Callender, or however desirous he might have been of procuring his conviction and punishment, still, not having seen the indictment, he could not divine what passages of the book were made the subject of the charges, and by the criterion established by the judge, he was a good juror. But if the juror's mind was thus prejudiced against the book and the writer, was he, merely because he had not seen the indictment, competent to pass between him and his country on the charges contained in it, and extracted out of the book? And even if the question had been such as the respondent states, yet being put in the conjunctive, the most inveterate foe of the traverser who was artful, or cautious enough to forbear the expression of his enmity, would thereby have been admitted as competent to pass between the traverser and his country in a criminal prosecution.

The 3d article relates to the rejection of John Taylor's testimony. This fact also is admitted, and an attempt is made to justify it, on the ground of its "*irrelevancy*," on the pretext that the witness could not prove the whole of a particular charge. By recurring to "The Prospect before Us," a book, which, with all its celebrity, I never saw till yesterday, I find this charge consists of two distinct sentences. Taken separately the respondent asserts that they mean nothing; taken together, a great deal. And because the respondent undertook to determine (without any authority as far as I can learn) that col. Taylor could not prove the whole, that is both sentences, he rejected his evidence entirely, for "*irrelevancy*." Might not his testimony have been relevant to that of some other witness, on the same, or on another charge? I appeal to the learning and good sense of this honorable court, whether it is not an unheard of practice (until the present instance) in a criminal prosecution,

to declare testimony inadmissible because it is not expected to go to the entire exculpation of the prisoner? Does it not daily occur in our courts, that a party accused, making out a part of his defence by one witness and establishing other facts by the evidence of other persons; does it not daily occur that the testimony of various witnesses sometimes to the same, and sometimes to different facts, does so *relieve* and support the whole case, as to leave no doubt of the innocence or guilt of the accused, in the minds of the jury, who, it must never be forgotten, are, in such cases, the sole judges both of the law and the fact? Suppose for instance that the testimony of two witnesses would establish all the facts, but that each of those facts are not known by either of them. According to this doctrine the evidence of both might be declared inadmissible, and a man whose innocence, if the testimony in his favor were not rejected, might be clearly proved to the satisfaction of the jury, may thus be subjected by the verdict of that very jury to an ignominious death. Shall principles so palpably cruel and unjust be tolerated in this free country? I am free to declare that the decision of Mr. Chase, in rejecting col. Taylor's testimony, was contrary to the known and established rules of evidence, and this I trust will be shewn by my learned associates, to the full satisfaction of this honorable court, if indeed they can require further satisfaction on a point so clear and indisputable. But this honorable court will be astonished when they are told (and the declaration will be supported by undeniable proof) that at this very time neither the traverser, his counsel, or the court, knew the extent to which col. Taylor's evidence would go. They were apprized, indeed, that he would shew that Mr. Adams was an aristocrat, and that he had proved serviceable to the British interest, in the sense conveyed by the book; but they little dreamt that his evidence, if permitted to have been given in, would

have thrown great light upon many other of the charges. There is one ground of defence taken by the respondent, which I did suppose, a gentleman of his discernment would have sedulously avoided. That although the traverser had justified nineteen out of twenty of the charges, contained in the indictment, if he could not prove the truth of the twentieth, it was of little moment, as he was, "thereby, put into the power of the court." Gracious God! Sir, what inference is to be drawn from this horrible insinuation?

In justification of the charges contained in the fourth article, the respondent, unable to deny the fact, confesses (page 61,) that he did require "the questions intended to be put to the witness to be reduced to writing, and submitted to the court," in the first instance (as we shall prove) and before they had been verbally propounded. And this requisition, he contends, it was "the right and duty of the court" to make. It would not become me, elsewhere, or on any other occasion, to dispute the authority of the respondent, on legal questions, but I do aver that such is *not* the *law*, at least in the state in which that trial was held, nor do I believe that it is law any where. I speak of the United States. Sir, in the famous case of Logwood, whereat the chief justice of the United States presided, I was present, being one of the grand jury who found a true bill against him. It must be conceded that the government was as deeply interested in arresting the career of this dangerous and atrocious criminal, who had aimed his blow against the property of every man in society, as it could be in bringing to punishment a weak and worthless scribbler. And yet, although much testimony was offered by the prisoner, which did, by no means, go to his entire exculpation, although much of that testimony was of a very questionable nature, none of it was declared *inadmissible;* it was suffered to go to the jury, who were left to judge of its weight and credibility,

nor were any interrogatories to the witnesses required to be reduced to writing. And I will go farther, and say that it never has been done before, or since Callender's trial, in any court of Virginia, (and I believe I might add in the United States) whether state or federal. No sir, the enlightened man who presided in Logwood's case knew that, although the basest and vilest of criminals, he was entitled to *justice*, equally with the most honorable member of society. He did not avail himself of the previous and great discoveries, in criminal law, of this respondent; he admitted the prisoner's testimony to go to the jury; he never thought it *his right*, or *his duty*, to require questions to be reduced to writing; he gave the accused a *fair trial*, according to law and usage, without any innovation, or departure, from the established rules of criminal jurisprudence, in his country.

The respondent also acknowledges his refusal to postpone the trial of Callender, although an affidavit was regularly filed stating the absence of material witnesses on his behalf; and here again the ground of his defence is, in my estimation, good cause for his conviction. The dispersed situation of the witnesses, which he alleges to have been the motive of his refusal, is, to my mind, one of the most unanswerable reasons for granting a postponement. The other three charges, contained in this article, will be supported by unquestionable evidence. The rude and contemptuous expressions of the judge to the prisoner's counsel; his repeated and vexatious interruptions of them; his indecent solicitude and predetermined resolution to effect the conviction of the accused. This predetermination we shall prove to have been expressed by him, long before, as well as on his journey to Richmond, and whilst the prosecution was pending; besides the proofs which the trial itself afforded.

The 5th article is for the respondent's having "awarded a capias against the body of James Thomp-

son Callender, indicted for an offence not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in such case made and provided;"—that is, contrary to the act of assembly of Virginia, recognized (by the act of Congress passed in 1789, for the establishment of the judicial courts of the United States) as the rule of decision in the federal courts, to be held in that state, until other provision be made. The defence of the respondent embraces several points: That the act of Virginia was passed posterior to the act of Congress, (viz. in 1792,) and could not be intended, by the latter, to be a rule of decision. Fortunately, there is no necessity to question (which we might well do) the truth of his position. It may be necessary to inform some of the members of this honorable court, that, about twelve or thirteen years ago, the laws of Virginia underwent a revision; all those relating to a particular subject, being condensed into one, and the whole code, thereby, rendered less cumbrous and perplexed. Hence many of our laws, to a casual and superficial observer, would appear to take their date so late as the year 1792, although their provisions were, long before, in force. The 28th section of this very act on which we rely, the court will perceive to have been enacted in 1788, one year *preceding* the act of Congress. (Virg. laws, chap. LXXIV, sec. 28, page 106, NOTE b. Pleasant's edition.) [Here Mr. Randolph read the act referred to.] "Upon presentment made by a grand jury of an offence not capital, the court shall order the clerk to issue a summons, or other proper process, against the person so presented, to appear, and answer such presentment at the next court," &c. But the respondent, aware no doubt of this fact, asserts that the act not being adduced, he was not bound to know of its existence, and that he ought not to be censured for the omissions of the traverser's counsel, whose duty it was to have cited it on

behalf of their client; and this objection, with the preceding ones, which I have endeavored to answer, will equally apply to the 6th article. Sir, when the counsel for the traverser were told by the judge at the outset, when they referred to a provision of this very law, "that such may be your local state laws, here in Virginia, but that to suppose them as applying to the courts of the United States, is a *wild notion*," would it not indeed have been a *wild experiment* in them to cite the same law with a view of influencing the opinion of a man, who had scornfully scouted the idea that he was to be governed by it.

Unwilling however to rest himself now, on the ground which he then took, the respondent justifies himself by declaring that he complied, although ignorantly, with this law, by issuing that *other proper process*, of which it speaks, that is, a capias. But that other process must be of the nature of a summons, notifying the party to appear at the *next term*; and will any man pretend to say, that a capias taking him into close custody and obliging him to appear not at the next but at the existing term, is such process as that law describes? Sir, not only the law but the uniform practice under it, as we are prepared to shew by evidence, declares the capias not to be the proper process. But it is said, that this would be nothing more than notice to the party accused to abscond, and therefore *ought not* to be law. Sir, we are not talking about what ought to have been the law; that is no concern of ours—the question is what *was* the law. But the impolicy of this mode of proceeding is far from being ascertained. It is a relief to the innocent who may be in a state of accusation. It saves the expense of imprisoning the guilty, and if they should prefer voluntary exile to standing a trial, is it so very clear that the state is thereby more injured than by holding them to punishment, after which they would remain in her bosom to perpetrate new offences. Remember,—this proceeding is against

petty offenders, not felons.—It does not apply to capital cases; to felonies, then, capital, for which our law has, since, commuted the punishment of death, into that of imprisonment at hard labour.

For further defence against the 6th article, the respondent takes shelter under this position: That the provision of the law of the United States establishing the judicial courts relates only to rights acquired under *state* laws, which come into question *on* the trial, and not to forms of process *before* the trial, and can have no application to offences created by statute, which cannot with propriety, be termed trials at "*common law.*" We are prepared to shew that the words "trials at common law" are used in that statute, not in their most restricted sense, but to contra-distinguish a certain description of cases from those arising in equity, or under maritime, or civil law.

I will pass over the seventh article of impeachment, as well because I am nearly exhausted, as being content to leave it on the ground where the respondent himself has placed it. It would be impossible for us to put it in a stronger light, than has been thrown upon it by his own admission.

The 8th and last article remains to be considered. [article read.] I ask this honorable court whether the prostitution of the bench of justice to the purposes of an hustings is to be tolerated? We have nothing to do with the politics of the *man*. Let him speak and write and publish as he pleases. This is his right in common with his fellow citizens. The press is free. If he must electioneer and abuse the government under which he lives, I know no law to prevent or punish him, provided he seeks the wonted theatres for his exhibition. But shall a judge declaim on these topics from his seat of office? Shall he not put off the political partizan when he ascends the tribune; or shall we have the pure stream of public justice polluted with the venom of party virulence? In short, does it

follow that a judge carries all the rights of a private citizen with him upon the bench, and that he may, there, do every act which, as a freeman, he may do elsewhere, without being questioned for his conduct?

But, Sir, we are told that this high court is not a court of errors and appeals, but a court of impeachment, and that however incorrectly the respondent may have conducted himself, proof must be adduced of criminal intent, of wilful error, to constitute guilt. The *quo animo* is to be inferred from the facts themselves; there is no other mode by which in any case it can be determined, and even the respondent admits that there are acts of a nature so flagrant that guilt must be inferred from them, if the party be of sound mind. But this concession is qualified by the monstrous pretention that an act to be impeachable, must be indictable. Where? In the federal courts? There not even robbery and murder are indictable, except in a few places under our exclusive jurisdiction. It is not an indictable offence under the laws of the United States for a judge to go on the bench in a state of intoxication—it may not be in all the state courts. But it is indictable no where, for him to omit to do his duty, to refuse to hold a court. And who can doubt that both are impeachable offences, and ought to subject the offender to removal from office? But in this long and disgusting catalogue of crimes and misdemeanors (which he has in a great measure confessed) the respondent tells you he had accomplices and that what was guilt in him could not be innocence in them. I must beg the court to consider the facts alleged against the respondent in all their accumulated atrocity;—not to take them, each in an insulated point of view, but as a chain of evidence indissolubly linked together, and establishing the indisputable proof of his guilt. Call to mind his high standing and character, and his superior age and rank, and then ask yourselves whether he stands justified in a long course of oppres-

sion and injustice, because men of weak intellect, and yet feebler temper—men of far inferior standing to the respondent, have tamely acquiesced in such acts of violence and outrage? He is charged with various acts of injustice, with a series of misconduct so connected in time and place and circumstance, as to leave no doubt, on my mind at least, of intentional ill. Can this be justified, because his several associates have at several times and occasions barely yielded a faint compliance, which perhaps they dared not withhold? Can they be considered as equally culpable with him whose accumulated crimes are to be divided amongst them, who had given at best but a negative sanction to them? But, sir, would the establishment of their guilt prove his innocence? At most it would only prove that they too ought to be punished. Whenever we behold the respondent sitting in judgment, there do we behold violence and injustice. Before *him* the counsel are always contumacious. The most accomplished advocates of the different states whose demeanor to his brethren is uniformly conciliating and temperate, are to *him*, and him only, obstinate, perverse, rude, and irritating. Contumacy has been found to exist only where he presided.

Mr. President, it appears to me that one great distinction remains yet to be taken. A distinction between a judge zealous to punish and repress crimes generally, and a judge anxious only to enforce a particular law whereby he may recommend himself to power, or to his party. It is this hideous feature of the respondent's judicial character, on which I would fix your attention. We do not charge him with a general zeal in the discharge of his high office, but with an indecent zeal in particular cases, for laws of doubtful and suspicious aspect. It is only in cases of constructive treason and libel, that this zeal breaks out. Through the whole tenor of his judicial conduct runs the spirit of party. I could cite the name and autho-

rity of a judge of whom, if I might be permitted to speak, I would say, that he was no less a terror to evil doers than a shield to the oppressed. In a commendable zeal for the faithful execution of the laws, he has never been surpassed, neither in tenderness to the liberty of the citizen, nor the liberty of the press, nor trial by jury. [Here Mr. R. read the following passage from Tucker's Blackstone, vol. 4, page 350.] "But it is not customary nor agreeable to the general course of proceeding (unless by consent of parties, or where the defendant is actually in gaol) to try persons indicted of smaller misdemeanors at the same court in which they have pleaded not guilty, *or traversed the indictment.*" [What follows is subjoined in a note.] And this is the practice in Virginia; but in the case of the United States against Callender, in the federal court at Richmond, May 1800, a different course was pursued, although the act of Congress (First Congress, 1 Sept. chap. 20, sec. 32.) may be interpreted otherwise. This is the very act and section on which we rely.

I have endeavored, Mr. President, in a manner, I am sensible, very lame and inadequate, to discharge the duty incumbent on me; to enumerate the principal points upon which we shall rely, and to repel some of the prominent objections advanced by the respondent. Whilst we confidently expect on his conviction, it is from the strength of our cause, and not from any art or skill, in conducting it. It requires so little support that (thank heaven) it cannot be injured by any weakness of mine. We shall bring forward in proof, such a specimen of judicial tyranny, as, I trust in God, will never be again exhibited in our country.

The respondent hath closed his defence by an appeal to the great Searcher of hearts for the purity of his motives. For his sake, I rejoice, that, by the timely exercise of that mercy, which, for wise purposes, has

been reposed in the executive, this appeal is not drowned by the blood of an innocent man crying aloud for vengeance; that the mute agony of widowed despair and the wailing voice of the orphan do not plead to heaven for justice on the oppressor's head. But for that intervention, self accusation before that dread tribunal would have been needless. On that awful day the blood of a poor, ignorant, friendless, unlettered German, murdered under the semblance and color of law, sent without pity to the scaffold, would have risen in judgment at the Throne of Grace, against the unhappy man arraigned at your bar. But the President of the United States by a well timed act, at once of justice and of mercy, (and mercy like charity covereth a multitude of sins,) wrested the victim from his grasp, and saved him from the countless horrors of remorse, by not suffering the pure ermine of justice to be dyed in the innocent blood of John Fries.

The Managers proceeded to the examination of witnesses in support of the prosecution.

WILLIAM LEWIS *affirmed.*

Mr. Dallas, Mr. W. Ewing and I were counsel for John Fries, at his request, and I believe by the assignment of the court, on his trial in the year 1799. It was conducted, I believe, in the usual manner, and we were certainly allowed all the privileges that are customary on such occasions. The trial was had before judges Iredell and Peters. He was convicted and a new trial was ordered, because one of the jurors had manifested a prejudice against the people in general concerned in the insurrection, and against Fries in particular. This trial took place partly in April and partly in May, 1799. At October session following, Mr. Dallas and I attended at Norristown, expecting the trial would again take place; but it did not. The proceedings on the first indictment were quashed by the district attorney, and a new bill was found at April term 1800, at which judges Chase and Peters presided. Mr.

Dallas and I appeared again as the counſel of Fries, at his requeſt, and I believe we were aſſigned by the court, but of this I am not certain. On the morning of a certain day, which I do not now recollect, I entered the court room when the judges were on the bench, and if I recollect rightly the priſoner was in the bar; but if he was not then there, I feel very ſure that he ſoon was. The liſt of petit jurors was called over, and many of them anſwered. Whether his trial had been appointed for that day, I do not recollect; nor can I ſay whether he was brought up in conſequence of ſuch appointment or not. I will now ſtate as accurately as is in my power what took place on the occaſion, premiſing that although my memory is a remarkably accurate one for a ſhort time, it is far from being ſo after a conſiderable lapſe of time. I will not, therefore, undertake to ſtate the preciſe words uſed in the altercation which took place; but I am very confident that I ſhall not vary from the ſubſtance. When I ſay that I am thus confident, I beg to be underſtood as not undertaking to diſtinguiſh poſitively in all reſpects between what took place on the firſt or on the ſecond day.

Almoſt immediately after the jurors were called over, judge Chaſe began to ſpeak. At this time Mr. Dallas had not come into court. Judge Chaſe ſaid, he underſtood, or had been informed, that on the former trial or trials, for it was impoſſible for me to know whether he alluded to the caſe of Fries only, or of him and others, there had been a great waſte of time in making long ſpeeches on topics which had nothing to do with the buſineſs, and in reading common law caſes on treaſon, as well as on treaſon under the ſtatute of Edward the Third, and alſo certain ſtatutes of the United States, reſpecting the reſiſting of proceſs, and other offences leſs than treaſon. He alſo ſaid, that to prevent this in future, he or they, I do not preciſely recollect which, had conſidered the law, had made up their minds, and had reduced their opinion to writing on the ſubject, and would not ſuffer theſe caſes to be read again; and in order that the counſel (but whether for the priſoner, or the counſel on both ſides, I cannot ſay) might govern themſelves conformably, he had ordered three copies of that opinion to be made out, one to be delivered to the priſoner's counſel, one to the counſel in ſupport of the proſecution, and the other, as ſoon as the caſe was fully opened, or gone through, I cannot ſay which, to be delivered by the clerk of the court to the jury. I rather think that the expreſſion was, fully gone through.

Mr. *Randolph*. And this, Sir, before the counſel had been heard?

Mr. *Lewis*. I have ſaid Mr. Dallas had not yet come into court, and as to myſelf I had not at this time ſaid a ſingle word. I think it was at or about this time, that judge Chaſe handed, or threw down to Mr. Caldwell, clerk of the court, one or more papers; but whether I ſaw them paſs immediately from the hands of one to the other, I am not certain. Mr. Caldwell reached one of the papers towards me. If I took it in my hand, I did not read a ſingle line of it. I remember well that ſpeaking aloud, but whether addreſſing myſelf to the court or not, I am not poſitive, and either waving my hand, or throwing the paper from me, I uſed this expreſſion—"I will never permit my hand to be tainted with a prejudged opinion in any caſe, much leſs in a capital one." If judge Peters made uſe of a ſingle expreſſion on the firſt day, I either did not hear him or do not recollect it.

Judge Chaſe, when ſpeaking of the authorities at common law, and thoſe under the ſtatute of Edward the Third, and I believe of the acts of Congreſs, ſaid he would not ſuffer them to be read again. I am ſure he ſaid he would not ſuffer the deciſions at common law, or under the ſtatute of Edward the Third, to be read. I am not altogether certain whether he did or did not ſay the ſame thing as to the ſtatutes of the United States; but I am perfectly ſure that he did ſay they had nothing to do with the question, and that he expreſſed himſelf in ſtrong terms of diſapprobation either at their having been read or permitted to be read on the former trial. I am not certain whether ſome parts of this as well as of that which I am about to mention occurred on the firſt or the ſecond day.

Judge Chaſe ſaid, I think on the firſt day, that they were judges of the law, and if they did not underſtand it they were unworthy of their ſeats, or unfit to ſit there, and that if the priſoner's counſel had any thing to ſay, to ſhew that they had miſtaken the law, or that they were wrong, the counſel muſt addreſs themſelves to the court for that purpoſe, and not to the jury. I made ſome obſervations in anſwer, which it is impoſſible for me in all reſpects to particularly recollect, as having paſſed at this time, ſince ſome parts of it may perhaps have taken place in other ſtages of the buſineſs. At this time Mr. Dallas was not in court. I was struck with what appeared to me to be a great novelty in the proceedings, and as I was ex-

tremely anxious to be of ſervice to Fries, I was deſirous that Mr. Dallas might be preſent. I think I went out of the bar to get ſomebody to go for him, and while I was out of the bar, he entered the room. I briefly ſtated to him what had taken place, or ſome parts of it; but I believe not the whole. We came forward, and we made ſome remarks which I am unable to repeat. I was early ſtruck with the idea, that as the court had made up their minds, and decided the queſtion of law, before the jury was ſworn, or the witneſſes or counſel heard, it was not likely we ſhould alter that opinion by any thing we might ſay, and that we ſhould probably render Fries more ſervice by withdrawing from his defence, than by engaging in it. We told him ſo, and earneſtly recommended to him to purſue that courſe. He appeared greatly alarmed and extremely agitated, and much at a loſs what determination to come to. We, however, told him, that, if he inſiſted on it, we would proceed in his defence at every hazard, and contend for what we deemed our conſtitutional rights as his counſel, until ſtopped by the court; or we uſed expreſſions to this effect. His ſtate of alarm and apprehenſion ſcarcely left him the power to decide for himſelf. After ſome time he acquieſced in our advice; ſaid he had nobody to depend on but us; that he was ſure we would do our beſt for him, and he would leave us to do for him as we pleaſed. Being very anxious for him, we told him we would call upon him at the jail, and ſatisfy his mind as to the courſe which we wiſhed him to purſue. He finally agreed to our propoſal to withdraw; but as we were apprehenſive that the court might aſſign him other counſel in our place, and that our views might be defeated by ſuch an arrangement, we adviſed him againſt accepting any, and I underſtood that he afterwards did refuſe to accept of any other counſel. I will not aſſign my reaſons for giving this advice, as it might perhaps be improper, unleſs I am directed by the court.

Mr. *Martin* aſked what thoſe reaſons were?

The *Preſident* deſired the examination to proceed on the part of the Houſe of Repreſentatives; and ſaid when that was cloſed, the witneſs might be examined by the counſel for Judge Chaſe.

Mr. *Lewis*. It being thus determined that we ſhould withdraw, and that Fries ſhould not accept any counſel that might be aſſigned him, I left the court, expecting to have little or nothing more to ſay, as we were no longer counſel for the

priſoner. The next morning, ſoon after the court was opened, and, I believe, when the priſoner was in the bar, Judge Chaſe addreſſed Mr. Dallas and myſelf, and probably Mr. Rawle, and aſked us if we were ready to proceed? I anſwered that I was not, or that we were not any longer counſel for the priſoner. He aſked our reaſons for this; and I began to anſwer by mentioning what had taken place the day before; on which he and Judge Peters certainly manifeſted a ſtrong diſpoſition that we ſhould proceed in the priſoner's defence, and that they would remove every reſtriction, which had been previouſly impoſed. I was ſtopped in what I was about to ſay by Judge Chaſe telling us to go on in our own way, and addreſs the jury on the law as well as the facts, as we thought proper; but at the ſame time he ſaid it would be under the direction of the court; and at our own peril, or the riſk of our characters if we conducted ourſelves with impropriety. This had rather a contrary effect on my mind than that of inducing me to proceed, as I did not know that there had been any thing in my conduct ſo indecorous as to make it neceſſary to remind me, that if I proceeded it ſhould be at my own peril and riſk of character; and this expreſſion, therefore, rather ſtrengthened than leſſened the determination which I had taken.

I have ſaid if judge Peters made uſe of a ſingle expreſſion on the firſt day I did not hear it, or have forgotten it. On the ſecond day he ſpoke, and joined judge Chaſe in urging us to proceed, in the priſoner's defence. He told us we might take as large a ſcope as we pleaſed; ſaid he knew the Philadelphia bar would take the ſtud; and aſked, if they (the judges) had committed an error or got into a ſcrape, would we not permit them to get out of it? I mentioned in this or ſome other ſtage of the buſineſs, that I deemed it the conſtitutional right of the priſoner to be heard by himſelf or counſel in his defence. That it was the conſtitutional right of the jury to hear counſel on the law as well as the facts; that it was their conſtitutional right to paſs between the priſoner and his country on both, and that it was the conſtitutional right of counſel to be heard by the jury on the law as well as the facts. If I did not deliver myſelf in theſe preciſe words, I am confident that the ſubſtance is the ſame, and that there is no material difference in the ſenſe. I alſo mentioned that I conſidered this a great conſtitutional right, which ſhould never be ſurrendered or ſacrificed by me. Of

this expreſſion I am ſure. And I added that I never had, nor ever would in a criminal proſecution addreſs a court either on the law or the facts: In this I find however that I was miſtaken; for I ſince recollect, though from the hurry of the moment I did not then, an inſtance where in a criminal caſe I did addreſs the jury on a point of law, which was ſeparate and diſtinct from the facts. Judge Peters remarked that no harm could ariſe from the papers, (containing the opinion of the court) as they, or the copies had been called in or collected, and either burnt or deſtroyed. To this I anſwered, that although the papers were or might be deſtroyed, the opinion which the court had formed, without hearing the priſoner's counſel, ſtill remained, and could not be eraſed from their minds, and would be as injurious to my client (the jurors being preſent and having heard what had paſſed) as if the papers had not been deſtroyed.

When judge Chaſe ſaid that we ſhould read no common law authorities, or deciſions under the ſtatute of Edward the third, before the revolution in England, I ſaid that we meant to contend that what was the law of treaſon in England under the head of "levying war," was not in all reſpects law here; that we did not mean to cite any caſes before the Engliſh revolution to prove what the law of treaſon was, or for any other purpoſe than to ſhew the dangerous lengths that the judges had gone while they were corrupt and dependent on the crown; that although ſince the revolution in England the judges had been independent and upright, they had in a variety of particulars held themſelves bound by a train of former deciſions which had taken place in bad times; but that the judges in this country in the conſtruction of a new inſtrument of our own defining the offence of treaſon, were not bound by any of the deciſions or conſtructions which had taken place in England under the ſtatute of Edward the third; and that the authorities we meant to cite were intended as a guard againſt the dangerous conſtructions which had prevailed in that country. It was not therefore to ſhew what the law was, but to guard againſt the dangers of conſtructive treaſon; and to ſhew that our judges were not bound by the Engliſh deciſions, that we had read them before and intended to read them again. This principle we contended for before, and meant to contend for again; and we were principally led to it, from Mr. Sitgreaves, who had aſſiſted the diſtrict attorney on the former trial, having begun by

ſtating "that the words of our conſtitution reſpecting treaſon are taken from the 25th Edward 3d, and therefore the people of this country had, by adopting the words of that ſtatute, adopted all judicial determinations under it." This poſition we could not agree to, and the caſes which had been read were merely intended to ſhew and guard againſt the dangerous lengths to which we ſhould be carried, if it were admitted to be true. Judge Chaſe aſked if the counſel offered to read caſes from any foreign country, (mentioning ſeveral with whom we had never been connected) was the court to permit them? We in reply ſaid that we had not cited ſuch caſes on the former occaſions, and it was not likely that we ſhould attempt it now.

Finding that Mr. Dallas and I were determined not to proceed in the priſoner's defence, judge Chaſe ſaid, if we intended to embarraſs the court we ſhould find ourſelves miſtaken, as they would proceed without us, and by the bleſſing of God render the priſoner as much juſtice, as if he had the aid of our counſel or aſſiſtance. Both the judges, therefore, on the ſecond day, even took pains to induce us to proceed in the defence with liberty to go through the whole queſtion as well in relation to the law as the facts; but we abſolutely refuſed, believing it not likely that any arguments we could urge, would change the opinion of the court already formed, or deſtroy its effects, and alſo believing that after what had taken place, the life of Fries, even if he ſhould be convicted, would be expoſed to leſs jeopardy without our aid than it would be if we ſhould engage in his defence.

Mr. *Nicholſon.* You ſay that on the firſt trial of Fries you were allowed the uſual latitude. What do you mean by uſual latitude?

Mr. *Lewis.* We were allowed to addreſs the jury on the law as well as on the facts. We were allowed the privilege of reading to the jury all ſuch law authorities as we thought applicable, and as might, under the direction of the court, tend to ſatisfy them, that the doctrine contended for on the part of the proſecution was not well founded. We met with no reſtraint or interruption, not having that I know of given occaſion for either.

Mr. *Nicholſon.* Were you on the firſt trial allowed to read the ſtatutes of the United States?

Mr. *Lewis.* Unqueſtionably—I have the notes in my pocket from which I ſpoke on that occaſion, which I can produce if deſired.

Mr. *Nicholſon.* Were you allowed to read caſes before the revolution as well as ſince?

Mr. *Lewis.* We were; we did it to ſhew the extravagant lengths to which conſtructive treaſon had been carried, and not what the law actually was.

In anſwer to an interrogatory,

Mr. *Lewis* ſaid that he did not read the opinion of the court which had been handed or thrown down; that he had never read it in his life.

Mr. *Randolph.* If not the oldeſt, are you not an old practitioner at the bar, and have you not been frequently employed in criminal caſes?

Mr. *Lewis.* I was admitted to practice in the court of common pleas in November 1774, and in the ſupreme court in April 1775, and I have been employed in a pretty extenſive practice almoſt ever ſince. Immediately after the Britiſh left Philadelphia in 1778, I was engaged for one hundred and fifty-three perſons charged with treaſon or miſpriſion of treaſon. I defended almoſt every man of them that was tried; and ſince that time I have been concerned in perhaps more capital caſes, particularly for treaſon, than any other gentleman in Pennſylvania, compared with our buſineſs in other reſpects.

Mr. *Randolph.* Did you ever ſee ſuch a proceeding as that which took place on the bench in the caſe of Fries; or did you ſee any thing before, to induce you to abandon the defence of your client?

Mr. *Lewis.* This queſtion ſeems to be a pretty general one, but if—

Mr. *Key.* If I underſtand this queſtion, it is calculated to draw from the witness an opinion, inſtead of a narration of facts.

The *Preſident* deſired Mr. Randolph to reduce his queſtion to writing.

While Mr. Randolph was engaged in penning it,

Mr. *Chaſe* ſaid he had no objection to the queſtion being put.

In the mean time the queſtion in writing had been handed to the chair, and been read by the clerk.

The *Preſident* ſaid the objection being withdrawn, the queſtion would be put unleſs objected to by any member of the Senate.

No objection being made,

Mr. *Lewis* anſwered. No, I did not.—It was entirely novel to me.

Mr. *Randolph.* And yet you have been preſent at criminal trials, at trials for treaſon, when there was a vaſt number of civil actions on the docket?

Mr. *Lewis.* Criminal trials for capital offences are generally tried before the court of oyer and terminer in Pennſylvania, where there is ſeldom much interference with civil ſuits.

At the circuit court of the United States in 1794, there were I believe many civil caſes. Judges Iredell and Peters preſided. I do not know, or believe, that the circumſtance of their being civil caſes occaſioned the leaſt variation in the mode of procedure in the criminal caſes.

Mr. *Lewis* ſaid he had one thing further to ſtate, that Mr. Dallas and he withdrew from a deſire to ſave the life of John Fries, and becauſe they thought it moſt likely that it would be effected by doing ſo, and not becauſe they were influenced by any other conſiderations, and that had it not been for this conſideration, he would have perſiſted in the exerciſe of what he deemed his profeſſional rights, until he was actually ſtopped by the authority of the court.

Mr. *Harper.* Did you not appear for Vigol?

Mr. *Lewis.* I did.

Mr. *Harper.* With what overt acts was he charged?

Mr. *Lewis.* The overt act was levying of war, particularizing the time and place.

Mr. *Harper.* I will aſk you whether on the trial of John Fries in 1799, in which Mr. Dallas and you appeared as his counſel, you did not make this point of law—that to reſiſt by force the execution of a particular law of the United States does not amount to treaſon, but to riot only? Or what was the point of law?

Mr. *Lewis.* On the firſt trial of Fries we made this point of law. Before the trial before judges Chaſe and Peters came on, I had conſidered the ſubject with great deliberation, and my determination was to inſiſt, that, although reſiſting the laws generally or even a particular law reſpecting the regular forces or militia of the nation was treaſon, yet that reſiſting any other particular law was not treaſon.

Mr. *Harper.* Was not the ſame point made on the firſt trial?

Mr. *Lewis*. It was.

Mr. *Harper*. Was it not ruled by the court that ſuch acts amounted to treaſon?

Mr. *Lewis*. It was.

Mr. *Harper*. When then the court granted a new trial did they expreſs any doubt on this point, or was it not granted on a collateral point?

Mr. *Lewis*. The new trial was granted ſolely on a collateral point.

Mr. *Harper*. How long did the trial laſt?

Mr. *Lewis*. I cannot tell; but it was a very long trial. The point of law was argued to the fulleſt extent, and we quoted all the authorities we thought relevant. I was aſſiſted by Mr. Dallas. We ſpoke very fully, and were laid under no reſtriction. At the laſt trial we meant to have alſo taken other ground, and to have contended that the trial could not take place in Philadelphia, but muſt be in the county in which the offence had been committed, according to a law of the United States, which provides that in capital caſes trials ſhall take place in the county where the crimes are committed, unleſs this cannot be without great inconvenience. This we had before contended; and had been then over-ruled becauſe it was alleged the county in which the offences had been committed was not free from a ſtate of inſurrection or the effects of it. At the time of the laſt trial, there was no inſurrection in the county where the offences charged againſt Fries had been committed, and we believed him, therefore, entitled to a trial in that county.

Mr. *Harper*. Did any part of judge Chaſe's written opinion go to this point?

Mr. *Lewis*. It was not mentioned to the court, as Mr. Dallas and I determined to have nothing further to do in the caſe.

Mr. *Harper*. Why did you abandon that part of your client's caſe? It was a new point, upon which you might have had the deciſion of the court.

Mr. *Lewis*. I did not wiſh to have any thing more to do with the caſe, after the manner in which we had been treated by the court.

Mr. *Hopkinſon*. Did not the court aſk Fries, whether he would have counſel aſſigned him?

Mr. *Lewis*. I believe there is no doubt of the fact.

Mr. *Randolph.* I underſtand you to ſay that by withdrawing from the defence of Fries, and the not having counſel aſſigned him, you expected to ſerve your client. Wherefore did you think the cauſe of your client would thereby be ſerved?

Mr. *Lewis.* It appeared to me that the conduct of the court juſtified us in withdrawing, after not being ſuffered to go on in the uſual manner, and I thought it more probable that a man, thus convicted, would be pardoned by the Preſident, than that we ſhould be able, by any thing we could ſay, to alter the opinion of the court.

Mr. *Nicholſon.* Were the jurors preſent?

Mr. *Lewis.* They were—they were called over as uſual, but I do not know that they were called for the trial of Fries. It was I believe uſual to call over the liſt on the morning of each day.

ALEXANDER J. DALLAS *ſworn.*

Mr. *Dallas.* I will endeavor to be correct in the ſtatement which it is my duty to give; and I am ſure that I ſhall be ſubſtantially ſo, though I cannot promiſe to place the facts preciſely in the order of time, in which they occurred; nor to recite the very words that were uſed by the ſeveral parties, in the courſe of the tranſaction.

When the Northern Rioters were brought to Philadelphia, in the ſpring of 1799, ſome of their friends applied to Mr. Ingerſoll and to me, to undertake their defence. Mr. Ingerſoll was then attorney general of Pennſylvania; and on conſideration, I believe, declined the taſk. Mr. Lewis, either before or after this application, was alſo requeſted to act as counſel for the priſoners; and upon his acquieſcence we repaired to the priſon, to make the neceſſary arrangements preparatory to a trial. Mr. Wm. Ewing had been engaged by ſeveral of the rioters, and we agreed to unite in the defence, as the ſame general facts and law, applied to all the caſes.

In April term 1799, the firſt trial of Fries took place. It was conducted with great propriety throughout by the court, and by the proſecuting officer; and the counſel of the priſoner were permitted to addreſs the jury at large, on the law and the facts; as well as to cite every authority which they thought proper. Fries was convicted; but on a motion made by Mr. Lewis and me, the verdict was ſet aſide, and a new trial awarded.

The ſecond trial of Fries, upon a new indictment (the firſt having been diſcontinued by Mr. Rawle) occurred in May, 1800. Mr. Lewis and I had again, at his requeſt, been aſſigned by the court, to defend him. On the morning fixed for the trial, I entered the court-room ſome time after the court had been opened. Fries was ſtanding in the priſoner's box: The jurors of the general pannel appeared to be in the jury boxes: And the hall was crowded with citizens. On my entrance, I perceived Mr. Lewis and Mr. E. Tilghman engaged eagerly in converſation, and the gentlemen of the bar, generally, ſeemed to be much agitated. As ſoon as Mr. Lewis ſaw me, he haſtened towards me, on the outſide of the bar; and told me in effect, "that a very extraordinary incident had occurred; that Mr. Chaſe, after ſpeaking in terms of great diſapprobation of the defence, at the former trial, declared that the court, on mature conſideration, had formed, and reduced to writing, an opinion on the law of treaſon, involved in the caſe; and that he ſhould direct one copy to be delivered to the attorney of the diſtrict, another to the priſoner's counſel, and a third [after the opening for the proſecution] to the jury to take out with them."

Here Mr. *Harper* roſe, and ſaid:—Mr. Preſident, ſurely it is improper that the witneſs ſhould repeat what Mr. Lewis told him, not in court, nor when the judge was preſent.

Mr. *Dallas*, turning to Mr. Harper, obſerved "ſir, I know the rules of evidence, and I mean to conform to them." Then turning to the Vice-Preſident, he continued; "If, Mr. Preſident, the counſel's patience had laſted for a minute, he would have heard, that I repeated Mr. Lewis's communication to the court, and that it was not contradicted. What I have ſaid was neceſſary to introduce that fact; and, ſurely, it is ſtrictly within the rules of evidence.

Mr. Lewis and I exchanged an opinion on the impropriety of the conduct of the court; we determined (as I thought when firſt recurring to my memory for the facts and as I ſtill think, though I wiſh not to ſpeak poſitively) to withdraw from the defence; and we went into the bar together. When there, ſomething occurred, which called the attention on our part; and Mr. Lewis informed the court in effect "that there was little diſpute about the facts in the cauſe; and that as the court had deliberately prejudged the law, he could not hope to change their opinion, nor to ſerve his client; while a ſub-

miſſion to ſuch a proceeding would be degrading to the profeſſion." It was then, I think, that I ſtated to the court, the information, which I had received from Mr. Lewis (but certainly it was either then, or, as it has been ſuggeſted to me by a reſpectable gentleman of the bar, at the opening of the court on the next day) and I pauſed, to give an opportunity for contradiction, or explanation. For although I had no doubt of Mr. Lewis's intention to deliver a correct repreſentation of what had paſſed, it was poſſible, and I might myſelf have miſtaken the import of his communication. I cannot now ſtate all that Mr. Lewis told me; but, I am confident, that I then repeated it all to the court. No remark being made, in conſequence of the pauſe, I proceeded to ſtate a few comparative obſervations on the province and rights of the judge, and the province and rights of the advocate; and concluded with declining to act any longer as counſel for the priſoner. The court was ſoon afterwards adjourned.—Theſe are all the material occurrences of the firſt day, which I recollect; except, perhaps, that ſoon after I came into court, I heard Mr. Peters remark to Mr. Chaſe: "I told you what would be the conſequence. I knew they would take the ſtud."

On the next day, the court was opened, Fries was placed in the priſoner's box, the jury attended, and the number of ſpectators were increaſed. Silence being proclaimed, Mr. Chaſe aſked, "if the priſoner's counſel were ready to proceed on the trial;" and Mr. Lewis and I, ſucceſſively, declared, that we no longer conſidered ourſelves as the counſel of Fries. Mr. Peters then, as well as at other times, expreſſed a great deſire that we ſhould overlook what had paſſed; he told us that the papers delivered the day before had been withdrawn, and that he did not care what range we took either on the law, or the fact. Mr. Chaſe alſo ſaid: "The papers are withdrawn; and you may take what courſe in the defence you pleaſe; but it is at the hazard of your characters." I thought the expreſſion was in the nature of a menace; that it was unkind, improper, and unneceſſary. Mr. Lewis obſerved, in effect: "You have withdrawn the papers; but can you eradicate from your own minds the opinion which you have formed; or the effect of your declaration on the attending jurors, a part of whom muſt try the priſoner?" Mr. Chaſe ſaid: "If you think to embarraſs the court, you will find yourſelves miſtaken." He then aſked Fries, if he choſe to have other coun-

ſel aſſigned? Fries anſwered, that he did not know how to act, but that he thought he would leave it to the court and the jury. On which judge Chaſe exclaimed; "Then we will be your counſel; and, by the bleſſing of God, do you as much juſtice, as thoſe who were aſſigned to you." Mr. Lewis and I had viſited Fries in priſon during the preceding afternoon; we had told him our determination to withdraw from his defence, unleſs he and his friends wiſhed us to reſume it; and we declared it to be, in our view of the caſe, his beſt chance to eſcape, as we could entertain no hope of changing the opinion of the court. He, finally, left the matter to us; and, I think, Mr. Lewis, in my hearing, with my concurrence, adviſed him not to accept other counſel, if the court ſhould offer to aſſign them. The reſt of the facts, as ſtated by Mr. Lewis, correſpond ſo preciſely with my recollection, that I preſume, after this recognition, it is unneceſſary to repeat them. I wiſh it, however, to be properly underſtood, that on the ſecond day, both the judges were extremely anxious to prevail on us to proceed in the defence; and, as I underſtood, withdrew all the reſtrictions of the preceding day. We perſiſted, however, in our determination; becauſe after what had happened, we deemed it the beſt chance to ſave our client's life; and not because we wiſhed (as has been inſinuated) to bring the court into diſgrace or odium. Fries was, accordingly, tried, and convicted without counſel.

It is, perhaps, proper to ſtate, what paſſed on the firſt trial of Fries, as it has been much miſunderſtood, or miſrepreſented. The general courſe of argument, *on the facts*, was an endeavor to ſhew that the acts of Fries and his companions amounted to nothing more than a riotous oppoſition to the direct tax officers, or obſtruction of the marſhal in the execution of proceſs; and the reſcue of a particular deſcription of priſoners, whom the marſhal had arreſted. We drew to our aid, in this part of the diſcuſſion, the ſections of the penal law, and the ſedition act, which provided for the puniſhment of ſuch offences, diſtinct from the crime of treaſon. The general courſe of our argument, on the law, was an endeavor to ſhew, that the offence did not amount to an act of levying war againſt the United States. The conſtitution defines that to be the only treaſon that can be committed; and neither the legiſlature, nor the courts, can amplify, or alter, the definition. The words of the conſtitution, however, require

a practical expoſition. This expoſition can only be obtained by a conſideration of the natural, the familiar, and the reaſonable import of the words themſelves, or by a reference to the gloſſary of the Engliſh deciſions on the ſame branch of treaſon, expreſſed in the ſame terms, in the Engliſh ſtatute of *Edward* 3. The gloſſary of the Engliſh deciſions ought not to be relied on. It is true, that ſince the Engliſh revolution of 1688, and, particularly, ſince the ſtatute of *William* 3, (which firſt gave judicial freedom to the Engliſh bench) the judges of England have been independent, as well as wiſe and virtuous; and implicit confidence may be repoſed in their judgments, upon all matters originally ſubmitted to their juriſdiction. But the Engliſh judges, ſince the revolution of 1688, are bound to adminiſter the law, according to the precedents eſtabliſhed by the Engliſh judges, before that revolution; although, either in criminal, or in civil matters, if the queſtion were *res integra*, they would themſelves, have decided in a different way. Hence, the counſel of Fries were induced to cite common law authorities, and authorities under the ſtatute of Edward 3, to ſhew (not what the law of England was or ought to be, not what the law of the United States was, or ought to be, but) what had been the extravagance of dependent judges, in ſetting the precedents, which the independent judges of England were bound to follow. Among other books they read Blackſtone's commentaries, where, in illuſtration of a poſitive or imputed treaſon, the commentator cites the caſes (under the ſtatute of Edward 3,) of one man being hung as a traitor, for ſaying that his ſon was heir to the crown, becauſe he was himſelf the owner of a tavern, with the ſign of the crown; and of another man's meeting the ſame fate, becauſe he wiſhed the horn of his buck, which had been killed by the king, in the belly of the monarch. Theſe were, indeed, the illuſtrations of Blackſtone, and not of Fries's counſel; but what profeſſional man need be aſhamed, to be ſuppoſed capable of reſorting to the ſame authorities, to enforce an argument, which Blackſtone had employed! Though the Engliſh judges were thus bound by precedents eſtabliſhed in very bad times of the juridical hiſtory of England, Fries's counſel contended that the American judges were not under the ſame obligation; and that the era of our federal conſtitution furniſhed a favorable opportunity to emancipate ourſelves from the trammels of conſtructions given to the

words of our conſtitution by corrupt and dependent courts, before the Engliſh revolution. Reſorting, then, to the natural, familiar, and reaſonable, import of the words, it was urged in defence of Fries, on the firſt trial, that it was not a caſe of treaſon, but of riot, obſtruction of proceſs, and reſcue of priſoners; that the diſcrimination in the offences, was marked by the very diſtinct nature of the actions; and that the ſedition act having treated the latter caſe, as a caſe of miſdemeanor, it was a legiſlative conſtruction, that it was not a caſe of treaſon. There was ſtill ground enough for the conſtitutional proviſion to occupy (an attempt by force to ſubvert the government, to defeat the legitimate operation of its principal departments, to attack, or to reſiſt, its military power, &c.) and, after the paſſing of the ſedition act, it might be preſumed, ſuch ground alone was intended to be occupied.

On this courſe of argument, we could not aſcertain the opinion of the court, nor how far the caſe of the Weſtern inſurrection would be deemed to apply, till the charge was pronounced. But, after hearing the charge, and after a new trial was granted, I confeſs the whole force of my mind was bent to ſhew, on the new trial, the ſtrong diſtinction between the caſes of 1794, and thoſe of 1799; and that, even in England, there was no authority ſince the revolution of 1688, for conſtruing the offence of Fries to be treaſon, unconnected with the obligation of the judges, to conform to the previous adjudications.

The *Preſident*. Both you and Mr. Lewis have ſtated, that the jury were preſent when the written opinions of the court were handed to the clerk: Could they hear what paſſed on the occaſion?

Mr. *Dallas*. Undoubtedly, ſir; I do not mean, however, the jury who tried Fries; but the general pannel of jurors, from whom Fries's jury might have been taken.

The court roſe about 4 o'clock.

MONDAY, *February* 11, 1805.

The court was opened at 12 o'clock.

Preſent, the Managers, attended by the House of Representatives in committee of the whole: and

Judge Chase, attended by his counsel.

Mr. *Randolph* obſerved, that it was the wiſh of the Managers that there ſhould be no departure from the ordinary rules obſerved in examining witneſſes, and that immediately after their examination on the part of the proſecution, they might be croſs examined by the counſel for the accuſed.

Mr. *Harper* hoped, that no abſolute rule would be adopted to this effect, as circumſtances might ariſe that would juſtify a departure from it. The counſel for the reſpondent would without any ſpecial rule endeavor to conform to the mode ſuggeſted. After a few further remarks from Mr. Martin and Mr. Nicholſon, it was agreed to wave any ſpecific motion.

Mr. *Lewis* was called in; when

Mr. *Harper* put to him the following queſtion:

Did you at the firſt trial of Fries make a diſtinction between reſiſtance to a particular law, and the general law of the United States, or ſome ſpecial laws of a peculiar nature, and ſtate your intention to argue that point on the ſecond trial.

Mr. *Lewis*. I was not able to anſwer the queſtion the other day preciſely. But having ſince looked at my notes, I find that that diſtinction was made and urged.

EDWARD TILGHMAN *ſworn.*

I was preſent at the circuit court of the United States, for the diſtrict of Pennſylvania, held on the 22d day of April, 1800. A very ſhort time after the opening of the court (whether the general pannel of jurors had been called over or not, I do not recollect) judge Chaſe declared that the court had maturely conſidered the law ariſing on the overt acts charged in the indictment againſt John Fries; and that they had reduced their opinion to writing; he mentioned that he underſtood that a great deal of time had been conſumed on a former trial, and that in order to ſave time, a copy of the opinion of the court would be given to the attorney of the diſtrict; another to the counſel for the priſoner, and that the jury ſhould have a third to take out with them. I took no notes of what paſſed either on the firſt or ſecond day. Fries was tried on the third day, and having been appointed with Mr. Levy, counſel for Heany and Getman, indicted for treaſon, and who were actually tried on the 27th or 28th, I deemed it my duty to attend the trial of Fries, to take notes of the evidence, the arguments and the charge of the judge. I do

not recollect that judge Chaſe ſaid any more on the firſt day than what I have mentioned previous to his throwing a paper or papers on the table round which the bar uſually ſit. The moment the paper or papers were thrown on the table, judge Chaſe expreſſed himſelf in theſe words: "Nevertheleſs, or notwithſtanding this, (I cannot recollect which expreſſion he uſed) "counſel will be heard." The throwing of the papers on the table and the addreſs of the judge cauſed ſome degree of agitation at the bar; in a ſhort time after the judge uſed the laſt expreſſion, I looked round and ſaw Mr. Lewis walking from under the gallery, towards the bar: I ſtepped towards Mr. Lewis, and met him directly oppoſite the entrance into the priſoner's bar. The priſoner, as well as I recollect, not being then in court, but being brought into court ſome time that morning, I entered into converſation with Mr. Lewis, and as well as I can recollect, during that converſation, Mr. Dallas came into court. Mr. Dallas and Mr. Lewis had ſome converſation in my hearing, after which they came forward to the bar; the paper, as well as I can recollect, was then handed by Mr. Caldwell, the clerk of the court, to Mr. Lewis. Mr. Lewis caſt his eyes on the outſide of the paper, and looked down, as if he was conſidering what to ſay. He threw the paper from him, as it appeared to me, without reading it, and the moment he threw the paper down, ſaid, "my hand ſhall never be ſtained by receiving a paper containing a prejudged opinion, or an opinion made up without hearing counſel." I cannot recollect which was the expreſſion, but this was the ſubſtance. I have not the leaſt recollection that any thing paſſed on the firſt day, between the counſel for the priſoner and the court; for when Mr. Lewis uſed theſe expreſſions, his face was not turned to the court, and he ſpoke with a conſiderable degree of warmth; the court ſat in the ſouth part of the room, and Mr. Lewis (I think) turned his face full to the weſtward, when he uſed theſe expreſſions. The paper lay on the table a conſiderable time; after which ſome gentlemen of the bar took it up, and I for one copied it. Whether I took the whole of it, and all the authorities cited, I cannot ſay. The priſoner having been brought into court, his counſel had a good deal of converſation in my hearing, on the ſubject of ſupporting or abandoning his defence; that converſation appears to me to have been accurately ſtated by Mr. Lewis and Mr. Dallas. I do not recollect why the priſoner was not put on

his trial that day, but the court adjourned between 1½ and 1 o'clock. I went home, and after taking a walk, on returning, I ſaw the diſtrict attorney on my ſteps. He aſked me whether I would have any objection to delivering up the copy which I had taken of the opinion of the court. I ſaid I had no objection, and gave it to him. That paper was not read on the firſt, or on any other day by the court, or any thing ſtated by the court, as the ſubſtance of it. On the next morning, to wit: the 23d, the priſoner was brought into court. The court aſked the priſoner's counſel, if they were ready to proceed to the trial. Mr. Lewis roſe and uttered a few words, in order to ſhew that they did not mean to proceed with it. Judge Chaſe here interrupted Mr. Lewis—the particular expreſſions of the judge I do not recollect; the ſubſtance of them was, that the counſel were not to conſider themſelves bound by the opinion which the court had reduced to writing the day before; that the counſel were at liberty on both ſides to combat that opinion. Judge Chaſe as well as judge Peters appeared to be very anxious that the counſel ſhould undertake the defence of the priſoner. Judge Chaſe ſaid, the caſes at common law before the ſtatute of Edward the Third, ought not to be read to the court: he mentioned the caſe of a man whoſe ſtag the king had killed, and who ſaid he wiſhed the ſtag's horns was in the king's belly; he alſo mentioned the man who kept a public houſe, with the ſign of the crown, and ſaid he would make his ſon heir to the crown. He ſaid ſuch caſes as theſe muſt not, ſhall not be cited; and I think he made uſe of theſe expreſſions: "What! caſes from Rome, Turkey and France!" That the counſel ſhould go into the law, but muſt not cite caſes that were not law. He ſaid that he had an opinion in point of law as to every caſe that could be brought before the court, or elſe he was not fit to ſit there. He ſaid ſomething (but the preciſe words I do not pretend to recollect) as to the counſel proceeding according to their conſciences; he ſaid that the gentlemen would proceed at the hazard of their character, and when it appeared pretty plain, that the gentlemen would not proceed in defence of the priſoner, he ſaid you may think to put the court to difficulties; but if you do, you miſs your aim, or words in ſubſtance to that effect. Judge Peters addreſſed the counſel, and ſaid if an error has been committed, why may it not be redreſſed? The paper has been withdrawn—and I think both the judges concurred in ex-

preſſing the ſentiment that matters were to be conſidered as if the paper had never been thrown on the table. When judge Peters mentioned that the paper had been withdrawn, Mr. Lewis anſwered, the paper, it is true, is withdrawn, but how can the court eraſe from their minds an opinion formed without hearing counſel. A good deal more paſſed which I do not recollect, having taken no notes. Mr. Dallas addreſſed the court, but I have no recollection of what he ſaid. The counſel continued firm in their determination to abandon the priſoner: the court took great pains to induce them to act as counſel for the priſoner, and before Fries was remanded to jail, expreſſed their hope that the counſel would think better of it, and appear in his defence. I recollect nothing more of what happened on the ſecond day. Should any queſtions be put to me, they may awaken a recollection of what does not now occur to me.

On the third day when the priſoner was brought to the bar, he was aſked whether he had any counſel (I think on the ſecond day, the court had mentioned to him that he might have other counſel) he ſaid no, he would depend on the court to be his counſel. Judge Chaſe ſaid, the court will be your counſel, and by the bleſſing of God, will ſerve you as effectually as your counſel could have done. The trial proceeded, and after the teſtimony was given and a ſhort ſtatement of the caſe made by the diſtrict attorney, the judge charged the jury; he told them they were judges of the law as well as the fact. He ſtated to them that caſes determined in England, before their revolution, ſhould not be received by the court. I have my notes of the charge; he ſtated the law very much in the manner as it was ſtated by judge Paterſon in the trial of Mitchell for whom I was counſel. I cannot undertake to recollect any thing further than I have already ſtated.

Mr. *Randolph*. I underſtood you to have ſtated that the written paper thrown or handed down by judge Chaſe on the table produced a conſiderable degree of agitation at the bar. From what do you conceive that agitation aroſe?

Mr. *Harper* ſaid he would take the opinion of the court, at ſome ſtage of the buſineſs, as to what was proper teſtimony. On Saturday there had been opinion and argument interwoven in the teſtimony given. He paid great deference to the opinion of the witneſs, but he ſubmitted it to the deciſion of the court whether it was proper to require it.

The *Preſident.* The gentleman may vary the queſtion, ſo as to attain his object, by enquiring as to the facts that took place.

Mr. *Randolph* then ſaid, I aſk, with the permiſſion of the court, whether in the courſe of your practice, which I underſtand to have been long and extenſive, you have ever witneſſed a ſimilar proceeding.

Mr. *Key.* I ſhall object to that queſtion. I pray the opinion of the court, whether, in order to abridge time——

The *Preſident* deſired that the queſtion might be in the firſt inſtance reduced to writing.

It was accordingly reduced to writing as follows:

Queſtion 1ſt. You ſay that when the written opinion of the court was thrown on the table, it produced conſiderable agitation among the gentlemen of the bar. What did you conceive to be the cauſe of that agitation?—which being read by the ſecretary,

Mr. *Bayard* moved that the Senate ſhould withdraw—the motion was loſt on a diviſion.

The queſtion was then taken on receiving the propoſed queſtion, and paſſed in the negative by an unanimous vote.

Mr. *Randolph* then ſubmitted in writing,

Queſtion 2d. In the courſe of your practice, which is underſtood to have been long and extenſive, did you ever witneſs a ſimilar proceeding on the part of the court?

To the putting of this queſtion, Mr. *Martin* withdrew the objection which had previouſly been made.

Mr. *Tilghman* anſwered. I have been in the practice of the law for thirty-one years, and have no recollection of a ſimilar proceeding.

Mr. *Randolph.* When Mr. Chaſe, after throwing or handing down the papers, went on to ſay that counſel would be heard, did he go on to ſay, or not, that counſel, when heard, muſt addreſs themſelves to the court and not to the jury.

Mr. *Tilghman.* I am confident that at that time he ſaid nothing of the ſort, nor do I recollect that he ſaid any ſuch thing at any other time. If he did it eſcaped my recollection, which is very ſtrong, as to what was ſaid by the judge when he threw down the paper or papers.

Mr. *Harper.* You have ſaid that you are perfectly clear, that when the paper was delivered or thrown down, the court did not ſay the counſel muſt addreſs themſelves to the court

and not to the jury, and I underſtand you alſo to ſay that you have no recollection that they ſaid any ſuch thing at any other time.

Mr. *Tilghman.* I have no recollection that they did.

Mr. *Harper.* Have you any recollection that the court at that time prevented the counſel from proceeding?

Mr. *Tilghman.* I have not.

Mr. *Harper.* Did the court forbid them during the proceedings, or on the trial, to cite caſes?

Mr. *Tilghman.* There were no counſel at the trial.

Mr. *Harper.* Did judge Chaſe at any time ſay that they would prohibit their reading the acts of Congreſs to the jury?

Mr. *Tilghman.* I do not recollect that he did.

Mr. *Harper.* Was any thing ſaid about the ſedition law, and the act——

Mr. *Tilghman.* I do not recollect that there was.

Mr. *Harper.* Did judge Chaſe expreſs any diſapprobation of the conduct of the circuit court on a former trial in ſuffering thoſe acts to be read?

Mr. *Tilghman.* I do not recollect that he did.

Mr. *Hopkinſon.* I think you have ſtated that you attended the trial of John Fries throughout?

Mr. *Tilghman.* I did.

Mr. *Hopkinſon.* Did you ſee any diſpoſition, or act, or conduct of the court calculated to oppreſs the priſoner?

Mr. *Nicholſon* objected to this queſtion being put, and Mr. Hopkinſon ſaid, that to avoid all difficulty, he would wave it.

Mr. *Martin.* Has it been the uſual practice in the courts of Pennſylvania for the judges to declare to the jury what is the law in criminal caſes?

Mr. *Tilghman.* They always in their charge to the jury ſtate the law and the evidence, and apply the law to the evidence.

To an interrogatory offered by Mr. Martin,

Mr. *Tilghman* anſwered. The court generally hear the counſel at large on the law, and they are permitted to addreſs the jury on the law and the fact; after which the counſel for the ſtate concludes; the court then ſtates the evidence to the jury, and their opinion of the law, but leaves the deciſion of both law and fact to the jury.

To another interrogatory of Mr. *Martin* as to the practice of the courts, Mr. *Tilghman* replied, that counſel generally take that courſe which they conſider beſt calculated to be-

nefit their clients. In capital cafes, he did not recollect the court ſtopping gentlemen of character in any courſe they thought fit to adopt.

Mr. *Nicholſon.* In your practice in Pennſylvania, or Delaware, where I underſtand you have practiced, did you ever hear the court undertake to inform the jury of their opinion of the law before the priſoner's counſel had been heard.

Mr. *Tilghman.* I do not recollect I ever did.

In anſwer to a queſtion,

Mr. *Tilghman* ſaid, in the charge to the jury, the contents of the paper containing the opinion of the court, and which had been withdrawn, were never alluded to; nor in the leaſt alluded to when it was thrown down or delivered.

Mr. *Nicholſon.* You have ſtated that the opinion was not read to the jury. I aſk whether when this paper was laid on the table the jury was ſworn?

Mr. *Tilghman.* No. They were not ſworn till the next day but one.

Mr. *Nicholſon.* Were the general pannel then in court?

Mr. *Tilghman.* According to my recollection the general pannel attended with great punctuality. I this morning looked over my notes and I took down thoſe that were challenged by Fries, and thoſe that tried him, in order to aſſiſt me in making my challenge in the caſe of Heany and Getman. But I do not know that I then ſaw the face of any of them. It is proper to ſtate that the common jury as ſoon as the court is opened generally walk forward into the jury box, which holds only eleven, a chair being placed for the twelfth—The other jurors take their ſeats behind thoſe in another box, or remain in the hall of the court.

Mr. *Nicholſon.* The judge declared that the counſel for the priſoner might proceed at the hazard of their characters?

Mr. *Tilghman.* I think thoſe were the words he uſed.

Mr. *Nicholſon.* Were the general pannel, at this time, in a ſituation to hear what was ſaid?

Mr. *Tilghman.* Certainly, ſir, this was on the ſecond day.

Mr. *Randolph.* Before the written opinion was handed down, did not Mr. Chaſe or the court declare that the queſtion of law had been ſettled in the caſe of Vigol and Mitchell?

Mr. *Tilghman.* On the trial of Fries they did cite this caſe and rely upon it. If the court will indulge me I can turn to my notes. Judge Chaſe ſtated the opinion of the court in his

charge to the jury to be the ſame as in the caſe of Vigol and Mitchell.

Mr. *Randolph.* Did he ſay that the opinion in the caſe of Vigol and Mitchell was the opinion contained in that paper?

Mr. *Tilghman.* I do not remember. Many things might have happened, of which I have no recollection as I did not take notes at the time.

Mr. *Campbell.* How many of thoſe papers were thrown down or given to the clerk?

Mr. *Tilghman.* I cannot ſay with perfect certainty. But I ſtated before that one was handed to the attorney of the diſtrict, another to the counſel for the priſoner, and the third to the jury to take out with them.

Mr. *Campbell.* Was there ſufficient time before the papers were withdrawn, for the jurors or other perſons to have read them?

Mr. *Tilghman.* I ſtated before that the court roſe between twelve and one o'clock. The jury were not in a ſituation to have acceſs to the bar table. After the paper lay for ſome time, ſeveral of the bar employed themſelves in copying it. I have no recollection that any one of the papers were handed into the jury box.

Preſident. At what hour were they withdrawn?

Mr. *Tilghman.* I think on the ſame day, between one and two o'clock, that the diſtrict attorney called on me. I am pretty certain that the papers thrown down were not taken away, but remained in the hands of the court.

Mr. *Campbell.* Can you ſay how many copies were taken?

Mr. *Tilghman.* Not preciſely. I took one, and Mr. Thomas Roſs another. I believe we copied them at the ſame time. But I do not know of my own knowledge that any other perſon tranſcribed them. Now I recollect, I think I ſaw one or two others alſo taking copies.

Mr. *Campbell.* Do you know whether all thoſe taken were withdrawn?

Mr. *Tilghman.* I do not. I only know that mine was withdrawn.

Mr. *Nicholſon.* Did you hear the ſubject ſpoken of generally that day?

Mr. *Tilghman.* Thoſe who copied the paper ſpoke on the ſubject to each other.

Mr. *Nicholſon.* I aſk whether it was a ſubject of general converſation?

Mr. *Tilghman.* Very much ſo among the gentlemen of the bar.

Mr. *Nicholſon.* You have ſaid that it is a uſual thing in the courts of Pennſylvania for the judge to charge the jury after the counſel on both ſides have ſpoken. Do you recollect to have ſeen a court reduce their charge to writing, and give it to the jury?

Mr. *Tilghman.* Never.

WM. S. BIDDLE *ſworn.*

Mr. *Randolph.* Were you preſent at the trial of John Fries?

Anſwer. I was.

Mr. *Randolph.* Were you preſent when the written opinion of the court was handed down?

A. From the length of time which has paſſed I have not a very diſtinct recollection of the circumſtances that occurred.

Mr. *Randolph.* Did you take a copy of that opinion, and was that copy the whole or a part of it?

A. I did take a copy in part; I took the ſubſtance in regard to the point of treaſon, but I believe I did not copy the whole.

Mr. *Randolph.* Were there other copies taken?

A. I know of one taken by Mr. Rawle.

Mr. *Randolph.* Was any application ever made to you to deliver up the copy in order to deſtroy it?

A. Never.

Mr. *Randolph.* Did you communicate to any perſons the ſubſtance of the copy?

A. Never, until during the laſt ſeſſion of Congreſs, in converſation with Mr. Dallas, I mentioned my being poſſeſſed of it, and he expreſſing a deſire to ſee it, I ſtepped over to my office and brought it.

Mr. *Randolph.* Although you did not take a copy of it verbatim, did you take the ſubſtance of it?

A. I did.

Mr. *Randolph.* Would you know that copy?

A. I ſubſcribed my name to it.

Mr. *Randolph.* Is that the paper? (ſhewing him a paper.)

A. Yes, it is.

Mr. *Randolph.* Did you hear much converſation about the paper at that time?

A. I have no diſtinct recollection; I attended the trial of Fries and others for treaſon, but I do not recollect any converſation about it.

Mr. *Randolph.* Can you tell whether the contents became known to any of the jurors?

A. I cannot.

Mr. *Harper.* I obſerve the paper contains notes and references to authorities; were they taken from the paper handed down by the court, or were they made by yourſelf?

A. I cannot ſay as to thoſe at the bottom; thoſe at the end were all my own.

Mr. *Martin.* Do you know whether the judges or the diſtrict attorney knew you had a copy?

A. I do not.

WM. RAWLE *affirmed.*

The circuit court of the United States ſat in Philadelphia in April, 1800. As the former proceedings in relation to the priſoners indicted for treaſon were conſidered at an end, except from the intervention of an act of Congreſs, it appeared to me moſt regular to quaſh all the previous proceedings. I made a motion to this effect, which was granted. On the ſame day the court charged the grand jury, and I ſent to them bills againſt John Fries, and other perſons charged with treaſon and other offences. The bill againſt John Fries was returned on the 16th a true bill, and he was immediately brought up, arraigned and pleaded not guilty. Meſſrs. Lewis and Dallas appeared as counſel for Fries. Copies of the indictment, and liſts of the jurors and witneſſes were furniſhed to Fries as directed by law. The bringing on the trial was poſtponed on account of the abſence of George Mitchel, whom I deemed to be a material witneſs. According to my beſt recollection it was not intended that John Fries ſhould be tried on the 22d, the firſt day alluded to. I cannot ſay that John Fries was then at the bar. That circumſtance does not appear on the minutes of the clerk of the court. It was certainly not my intention that he ſhould have been brought up, but he may poſſibly have been brought through miſtake. Shortly after the court met, judge Chaſe obſerved, that as much time had been loſt on the former trial or trials, the court had determined to expreſs their opinion in writing, on the

point of law, that they might not be misunderstood; that they had therefore committed that opinion to writing, and that the clerk had made copies of it, one of which should be given to the district attorney, one to the counsel for the prisoner; and one the jury should take out with them: as these words were pronounced, several papers, I think three, were handed down or thrown down, as it were; my back was to the court, and whether this was done by judge Chase or the clerk, I know not. I immediately took up the one intended for me and began to read it, but casting my eyes to the opposite side of the table, I saw Mr. Lewis with another copy before him, looking at it, apparently with great indignation, and then throwing it on the table. I am pretty clear that nothing passed between the court and the counsel in the course of that morning. I observed much agitation among the gentlemen of the bar, who were conversing with each other with apparent warmth; but having at that time, a very great burthen of criminal prosecutions on me, my attention was much engaged, and I did not hear distinctly what was said, nor did I know, until the court rose, that there was a probability of the counsel for John Fries declining to act. I think that twenty-one persons were that day brought before the court charged with seditious combinations, and who submitted to the court. The court rose pretty early in the morning, and intimated that I should not call any witnesses in relation to the submissions until the trials for treason were over. When the court rose I learnt from several gentlemen, that Mr. Lewis and Mr. Dallas were disgusted with the conduct of the court, and meant to decline acting as counsel for Fries, and I have an indistinct recollection that I heard something of this kind drop from Mr. Dallas himself. I went home, and had been there but a few minutes, when judge Chase and judge Peters came in. We went into another room, and judge Peters began by expressing a good deal of uneasiness, from an apprehension that the gentlemen assigned as counsel for John Fries would not go on. Judge Chase said he could not suppose that that would be the consequence. I supported the idea which judge Peters had expressed; I told him the gentlemen of the Philadelphia bar were men of much independence and character, and that unless those papers were withdrawn, and the business conducted as usual at our bar, they probably would desist from conducting the defence. My recollection at this distance of time cannot be very distinct, but I am pretty well satisfied

that judge Chaſe expreſſed his regret that the conduct of the court ſhould be ſo taken, and ſaid, that he did not mean, that any thing which he had done ſhould preclude the counſel from making a defence in the uſual manner. Judge Peters aſked if I would conſent to go out, and undertake to recover the papers. I ſaid I had no objection, and both the judges concurred in requeſting me to do ſo. I recollected ſeeing Mr. Edward Tilghman and Mr. Thomas Roſs engaged in making copies— I did not recollect to have ſeen any others ſo engaged. I went to their houſes and aſked for the copies, which were readily given, and took them to Mr. Caldwell, clerk of the court. I aſked him if he had noticed any others to have been taken? He ſaid, he thought a copy had been taken by Mr. William Meredith. I deſired him to go to him and endeavor to recall it. I did not know that Mr. Biddle, who was then a ſtudent in my office, had taken a copy in part, or I ſhould have deſired him to give it up. From ſome circumſtances which I do not recollect, I find that I did not hand my own copy to Mr. Caldwell. I now have it in my poſſeſſion. The paper was not read, I think, by any but thoſe who tranſcribed it, and I entertained an anxious hope, after what had taken place, that the gentlemen would proceed with the defence of the priſoner. I ſhall now take the liberty of referring to ſome original notes made by me at the time—from which I can ſtate what paſſed the following morning. So far as they go, I believe them accurate, though they may not enable me to relate all that was ſaid. On the 23d April, John Fries was brought and put to the bar, Meſſrs. Lewis and Dallas attending. The court aſked if we were ready to proceed. Mr. Lewis roſe and ſaid, if employed by the priſoner, I ſhould think myſelf bound to proceed, but being aſſigned—he was here interrupted by judge Chaſe, who ſaid, "you are not bound by the opinion delivered yeſterday, you may conteſt it on both ſides." Mr. Lewis anſwered, I underſtood that the court had made up their minds, and as the priſoner's counſel have a right to make a full defence, and addreſs the jury both on the law and the fact, it would place me in too degrading a ſituation, and therefore I will not proceed. Judge Chaſe anſwered with apparent impatience— "You are at liberty to proceed as you think proper, and addreſs the jury and lay down the law as you think proper." Mr. Lewis anſwered with conſiderable emphaſis, I will never addreſs the court in a criminal caſe on a queſtion of law. He

then took a pretty extenſive view on the propriety of going into caſes decided before the revolution, and ſaid, if he was precluded from ſhewing that the judges ſince the revolution in England had conſidered themſelves bound by the deciſions before the revolution, which ought not to be the doctrine in this country, he muſt decline acting as counſel for the priſoner. Judge Chaſe anſwered, ſir, you muſt do as you pleaſe. Mr. Dallas then addreſſed the court. He contended that the rights of advocates had been encroached upon by the proceedings of the day before. He went into a general view of the ground taken by Mr. Lewis, and concluded with his determination not to proceed as counſel for John Fries.

Judge Chaſe then obſerved—no opinion has been given as to facts in this caſe. I would not let the witneſſes be examined in the combination caſes becauſe I would not let the jury hear them before the trial of Fries came on. As to the law I knew that the trial before had taken nine days—that many common law caſes were cited, ſuch as wiſhing a ſtag's horns in the king's belly, and that of a man's ſaying he would make his ſon heir to the crown; ſuch caſes ought not, ſhall not go to the jury. No caſe can come before me on which I have not a decided opinion as to the law, otherwiſe I ſhould not be fit to preſide here. I have always conducted myſelf with candor, and I meant, gentlemen, to ſave you trouble. It is not reſpectful, nor is it the duty of counſel, to ſay they have a right to offer any thing they pleaſe. What! deciſions in Rome, France, Turkey? No lawyer will ſay that common law caſes are law under the ſtatute of Edward the Third, nor juſtify thoſe judges who overſet the ſtatute of William, and overrule the neceſſity of having two witneſſes to one overt act, and admit hearſay teſtimony to prove matters of fact. It is the duty of counſel to lay down the law, but not to read caſes that are not law. Having thus explained the meaning of the court, you will ſtand acquitted or condemned to your own conſciences, as you think proper to act. But, gentlemen, do as you pleaſe. The courſe will be, the diſtrict attorney will open the law, ſtate his caſe, and produce his witneſſes. You are at liberty to controvert the law as to the matter, but the manner muſt be regulated by the court. Judge Peters ſaid you are to conſider every thing done yeſterday as withdrawn. Mr. Lewis replied, true, ſir, the papers are withdrawn, but the ſentiments ſtill remain, I ſhall not therefore act.

Mr. Dallas expreſſed the ſame determination, which I did not take down.

A pauſe, for a few moments, took place, when judge Chaſe ſaid, you cannot put the court into a difficulty, by this conduct, gentlemen; you do not know me if you think ſo; and deſiring the perſons between him and the priſoner to ſtand aſide, and addreſſing himſelf to John Fries, he aſked, are you deſirous of having other counſel aſſigned you, or will you go on to trial without? John Fries, after a pauſe, ſaid he did not know what to do; he would leave it to the court. Under theſe circumſtances I felt a repugnance to go on with the trial, not wiſhing to act in a caſe ſo extremely ſingular. I therefore moved to poſtpone the trial to the next day; the court readily concurred, and Fries was remanded to jail.

On the 24th, Fries was brought to the bar again. Judge Chaſe aſked him if he had any counſel. He told the court that he relied on them as his counſel, and he expreſſed himſelf with a degree of firmneſs and compoſure that convinced me that his deciſion was formed on mature reflection. Then, judge Chaſe anſwered, by the bleſſing of God we will be your counſel, and do you as much juſtice as thoſe aſſigned you.

The jury were then called over, and the court took pains to inform Fries of his right to challenge 35 without cauſe; and as many others as he could ſhew cauſe againſt. In every inſtance they appeared extremely anxious that he ſhould defend himſelf. There were one or two friends near him, I believe, to aſſiſt him in his challenges. After the jurors had been ſeverally paſſed by him, and before they were ſworn, the court directed that they ſhould ſeverally be aſked whether they had delivered an opinion on the ſubject. The firſt juror ſaid he had not, and was ſworn; the ſecond ſaid he had; he was then ſworn to make true anſwers; and he declared that he had in a converſation ſaid that theſe men ought to be puniſhed; the court directed this perſon to be ſet aſide, and he was not ſworn on the trial.

The court afterwards directed the queſtion to be ſomewhat altered.—"Have you formed *or* delivered an opinion, &c.?" Before this queſtion was put to more than three perſons, it was again altered, and put in theſe words: "Have you formed *and* delivered an opinion?" Three, including the one already mentioned, anſwered affirmatively, and were ſet aſide. The priſoner challenged, without cauſe, thirty-four of the

panel. Twelve jurors were then ſworn, and I opened the caſe in a very brief manner, laid down the law, and adduced the teſtimony. The trial laſted till the afternoon, and till the next day; the court retired twice for refreſhment and repoſe. John Fries called no witneſſes. But at the end of the examination of each witneſs called on the part of the proſecution, judge Chaſe reminded him that he had a right to put any queſtion to the witneſs that he thought proper, and told him to be cautious not to put any queſtion the anſwer to which might injure him. When the evidence on the part of the proſecution had cloſed, John Fries expreſſed his determination to call none on his part. I then addreſſed the jury in as brief a manner as I could, conſiſtent with the duty I had to perform, for I ſeverely felt the unpleaſantneſs of the ſituation in which I ſtood, acting againſt a man tried on a capital charge without profeſſional aſſiſtance. The court then charged the jury, who retired, and in about half an hour returned with a verdict of guilty. Theſe are all the general facts I recollect in relation to the trial.

Mr. *Randolph*. Did you on the firſt day, the 22d of April, hear Mr. Lewis expreſs in court any ſentiments in regard to the paper which you ſay he viewed with ſuch indignation?

Mr. *Rawle*. I have no recollection of hearing Mr. Lewis ſay one word on that day.

Mr. *Randolph*. You ſtated that on the next day, Mr. Lewis, when told by the court to proceed as he thought proper, anſwered that he never would addreſs the court in a criminal caſe on a point of law, and urged the propriety of citing caſes before the revolution, to ſhew that the Engliſh judges ſince the revolution thought themſelves bound by caſes before the revolution, which ought not to be the law in this country, and that if he was not permitted to do this, he would be obliged to abandon the defence?

Mr. *Rawle*. Yes ſir.

Mr. *Randolph*. Did you hear any opinion given by the court, which warranted Mr. Lewis in the opinion that he was precluded from citing ſuch caſes?

Mr. *Rawle*. On the 23d I did underſtand the court to ſay that ſuch caſes ſhould not be cited, becauſe they tended to miſlead the jury. But at no time did I hear the court ſay that counſel were precluded from addreſſing the jury on the law, but it was ſaid that as to the authorities cited, it muſt be determined by the court, whether they were admiſſible or not.

Mr. *Randolph.* You ſtated that both the judges after the adjournment came to your houſe. Was your houſe their place of abode?

Mr. *Rawle.* No ſir.

Mr. *Randolph.* At what hour did they call?

Mr. *Rawle.* About ten o'clock.

Mr. *Randolph.* And that judge Peters expreſſed an aprehenſion that Meſſrs. Lewis and Dallas would not go on?

Mr. *Rawle.* Yes ſir.

Mr. *Randolph.* On what grounds did he expreſs this apprehenſion?

Mr. *Rawle.* I do not know.

Mr. *Randolph.* Have you any recollection of any grounds for ſuch an apprehenſion, except that which aroſe from the general character of the bar.

Mr. *Rawle.* I have already ſtated that I underſtood there was a meaſure of that kind in contemplation. I have a faint recollection of having heard ſomething of that kind fall from Mr. Dallas.

Mr. *Randolph.* Did you expreſs to the judges that your opinion was drawn from any other ſource than your general knowledge of the bar?

Mr. *Rawle.* I do not recollect that I did.

Mr. *Randolph.* Mr. Chaſe expreſſed his regret, and ſaid he did not mean to preclude the counſel from proceeding in the trial in the uſual manner. Was the courſe purſued in the caſe of Fries in the uſual manner?

Mr. *Rawle.* I never ſaw a ſimilar circumſtance take place at our bar during the whole courſe of my life.

Mr. *Randolph.* Is it uſual for the court to give a general opinion on the law before counſel are heard?

Mr. *Rawle.* Never, except on their general charge to the grand jury. They ſometimes enquire of the gentlemen who proſecute, what are the offences likely to be preſented, in order to inform the grand jury what it is their duty to do, and to make their charge more pointed.

Mr. *Randolph.* Did you ever hear of its being done in a particular caſe before the court?

Mr. *Rawle.* Not that I recollect.

Mr. *Randolph.* Do you know whether much converſation took place at the bar on this novel opinion thrown down on the table?

Mr. *Rawle.* I ſtated before that I had a great burthen of criminal caſes to manage; as I was ſituated it was not in my power to keep up the uſual colloquial intercourſe, and I cannot recollect any converſation until that which I have mentioned.

Mr. *Randolph.* Do you ſuppoſe that the act of delivering the opinion in writing was ſo public as to attract the notice of the jurymen that were attending?

Mr. *Rawle.* From the number of the jurymen, and from the conſtruction of the court room, I think that a conſiderable proportion muſt have paid attention to the tranſaction.

Mr. *Randolph.* If you heard Mr. Lewis uſe no language on the opinion of the court, whence do you infer his indignation?

Mr. *Rawle.* From his countenance, and the manner of his throwing down the paper?

Mr. *Randolph.* Was it ſuch as to attract the attention of thoſe in court?

Mr. *Rawle.* If they ſaw him, they muſt have been ſtruck with the manner in which he expreſſed his indignation. It was very ſtrong.

Mr. *Randolph.* Did you hear Mr. Chaſe ſay, that if the priſoner's counſel had any objection as to the law, as laid down by the court, they muſt addreſs the court and not the jury?

Mr. *Rawle.* I have no recollection of hearing ſuch an expreſſion fall from judge Chaſe at any time.

Mr. *Nicholſon.* You ſtated much of your teſtimony from your notes. I would aſk, ſir, were thoſe notes taken at the time, and in the order they ſtand arranged?

Mr. *Rawle.* Preciſely ſo, ſir. I made my notes in court.

Mr. *Nicholſon.* What was there in the conduct of judge Chaſe that induced the counſel to infer that they would be precluded from citing the ſtatutes of the United States which have been referred to?

Mr. *Rawle.* I cannot ſay from what circumſtance, unleſs from a recollection of the ſtrenuous oppoſition made on a former trial on the part of the proſecution to the courſe then adopted.

Mr. *Nicholſon.* Judge Chaſe alſo declared: "No caſe can come before us on which I have not an opinion as to the law, otherwiſe I ſhould not be fit to preſide here." Was there any thing which took place prior to this on which Mr. Lewis

founded the opinion that he would be compelled to addreſs the court and not the jury?

Mr. *Rawle.* It appeared to me that it aroſe altogether from miſapprehenſion. Nothing fell from the court in my hearing, either in public, or in private, which tended to control the counſel from ſpeaking, or to withdraw the conſideration of the law from the jury. There appeared to be much miſapprehenſion; and I obſerved that the court did not ſet him right as explicitly as might have prevented part of this miſapprehenſion.

Mr. *Randolph.* I think you ſaid that you entertained at the time of your conference with the judges, an anxious hope that the gentlemen would be induced to proceed. If there is no impropriety in the queſtion, I wiſh to know the cauſe of the great anxiety you felt on that ſubject, which induced you to become the agent of calling in the papers containing the opinion of the court?

Mr. *Rawle.* My reaſons aroſe from an anticipation of thoſe unpleaſant ſenſations, which I would never wiſh my greateſt enemy to feel, that of conducting a trial, in a capital caſe, and ſtanding alone againſt a man without counſel. It is eaſy to conceive that my hopes may have been anxious that I might not be placed in ſuch a painful ſituation.

Mr. *Nicholſon.* I will aſk you whether you took notes of what paſſed on the firſt day?

Mr. *Rawle.* I did not.

Mr. *Harper.* Inform the court whether judge Chaſe did at any time during the proceedings ſay that he would reſtrict the counſel of Fries from citing any ſtatutes of the United States to the jury, and eſpecially the ſedition law?

Mr. *Rawle.* I do not recollect that he did.

Mr. *Harper.* Did he ſay that he diſapproved of the conduct of the former circuit court in permitting the ſtatutes of Congreſs to be read?

Mr. *Rawle.* He did not. I never heard any ſuch expreſſion from judge Chaſe in relation to the ſtatutes.

Mr. *Harper.* Have you the paper in your poſſeſſion which was thrown down on the table?

Mr. *Rawle.* I have it in my pocket.

Mr. *Harper.* Will you pleaſe to produce it?

Mr. *Rawle.* This is it, (handing it to Mr. Harper.)

Mr. *Harper.* Do you know in whoſe hand writing it is?

Mr. *Rawle.* In that of the aſſiſtant clerk of the court—Mr. Bond.

Mr. *Harper.* We will offer this paper in evidence.

Mr. *Harper* then read the paper as follows, being exhibit No. 2.

"The priſoner, John Fries, ſtands indicted for *levying war* againſt the United States.

"This *conſtitutional* definition of *treaſon* is a queſtion of *law*. Every propoſition in any ſtatute (whether more or leſs diſtinct; whether eaſy or difficult to comprehend) is always a queſtion of *law*.

"What is the true meaning and true import of the ſtatute, and whether the caſe ſtated comes within the ſtatute, is a queſtion of *law* and not of *fact*. The queſtion in an indictment for *levying war* againſt (or adhering to the enemies of) the United States, is "whether the *facts* ſtated, do or do not amount to *levying war*."

"It is the duty of the court in this, and in all *criminal* caſes, to ſtate to the jury, their opinion of the law ariſing on the facts; but the jury are to decide on the preſent, and in all criminal caſes, *both the law and the facts*, on their conſideration of the *whole* caſe.

"The court heard the indictment read on the arraignment of the priſoner, ſome days paſt, and juſt now on his trial, and they attended to the *overt acts* ſtated in the indictment.

"It is the opinion of the court that any inſurrection or riſing of any body of people, within the United States, to attain or effect, by *force* or *violence*, any object of a great public nature, or of public and general (or national) concern, is a levying war againſt the United States, within the contemplation and conſtruction of the conſtitution of the United States.

"On this general poſition, the court are of opinion, that any ſuch inſurrection or riſing to reſiſt or to prevent by force or violence, the execution of any ſtatute of the United States, for levying or collecting taxes, duties, impoſts or exciſes; or for calling forth the militia to execute the laws of the union, or for any other purpoſe (under any pretence, as that the ſtatute was unequal, burthenſome, oppreſſive, or unconſtitutional) is a levying war againſt the United States, within the conſtitution.

"The reaſon for this opinion is, that an inſurrection to reſiſt or prevent by force the execution of any ſtatute, has a

direct tendency to diſſolve all the bonds of ſociety, to deſtroy all order, and all laws, and alſo all ſecurity for the lives, liberties, and property of the citizens of the United States.

" The court are of opinion that military weapons (as guns, and ſwords, mentioned in the indictment) are not neceſſary to make ſuch inſurrection or riſing amount to levying war, becauſe numbers may ſupply the want of military weapons; and other inſtruments may effect the intended miſchief. The legal guilt of levying war may be incurred without the uſe of military weapons or military array.

" The court are of opinion that the aſſembling bodies of men, armed and arrayed in a warlike manner, for purpoſes only of a private nature, is not treaſon; although the judges and peace officers ſhould be inſulted, or reſiſted; or even great outrage committed to the perſons and property of our citizens.

" The true criterion to determine whether acts committed are a treaſon or a leſs offence (as a riot) is the *quo animo* the people did aſſemble. When the intention is univerſal or general, as to effect ſome object of a general public nature, it will be treaſon, and cannot be conſidered, conſtrued, or reduced to a riot. The commiſſion of any number of felonies, riots, or other miſdemeanors, cannot alter their nature, ſo as to make them amount to treaſon; and on the other hand, if the intention and acts combined amount to treaſon, they cannot be ſunk down to a felony or riot. The intention with which any acts (as felonies, the deſtruction of houſes, or the like) are done, will ſhew to what claſs of crimes the caſe belongs.

" The court are of opinion that if a body of people conſpire and meditate an inſurrection, to reſiſt or oppoſe the execution of any ſtatute of the United States by force, that they are only guilty of a high miſdemeanor; but if they proceed to carry ſuch intention into execution by force, that they are guilty of the treaſon of levying war, and the quantum of the force employed, neither leſſens nor increaſes the crime; whether by one hundred or one thouſand perſons is wholly immaterial.

" The court are of opinion, that a combination or conſpiracy to levy war againſt the United States is not treaſon, unleſs combined with an attempt to carry ſuch combination or conſpiracy into execution; ſome actual force or violence muſt

be uſed in purſuance of ſuch deſign to levy war, but that it is altogether immaterial whether the force uſed is ſufficient to effectuate the object; any force, connected with the intention, will conſtitute the crime of levying war."

Mr. *Harper.* I will aſk you one queſtion. Do you recollect whether, after the verdict of guilty was brought in againſt John Fries, the court gave him information of his right to make a motion for an arreſt of judgment.

Mr. *Rawle.* When the verdict was brought in, the court briefly told him he might be heard then or at a future day. When he was afterwards brought up for ſentence, they told him, if he, or any perſon for him could point out any error or irregularity in the courſe of the proceedings, they ſhould be patiently heard; and in like manner judge Chaſe addreſſed the other priſoners; the ſame queſtion was put to all that were found guilty. They anſwered, that they had nothing to ſay.

Mr. *Hay* being called, and not immediately appearing—

Mr. *Harper* obſerved that this witneſs was called on an article ſubſequent to that on which the witneſſes already examined had teſtified. He would ſubmit a propoſition to the honorable Managers, to go through at one time the whole of the teſtimony on each article. It might not be the regular courſe, but if gentlemen aſſent to it, ſaid Mr. H. we ſhall prefer it; it will be convenient to the witneſſes, many of whom may be diſcharged before the whole of the teſtimony is gone through.

Mr. *Randolph.* Though this mode may have its advantages, it is attended with its difficulties. A witneſs may be found to ſupport more than one article. With regard to the firſt article, I have no objection to this courſe; but with regard to the ſubſequent articles I have.

Preſident. If the gentlemen are agreed, I will take the ſenſe of the Senate on the courſe to be purſued.

Mr. *Randolph.* It is the wiſh of the Managers not to depart from the uſual courſe.

Mr. *Harper.* We do not claim it as a right.

GEORGE HAY *ſworn.*

The greater part of the evidence I am to deliver relates to what was ſaid by me as counſel for J. T. Callender, who was

indicted for a libel on the President of the United States, and what was said by *one* of the judges; for I do not recollect to have heard the voice of judge Griffin at any time during the trial. In order to make this statement as accurate as possible, as my memory is not strong, it is necessary to resort to a statement made by myself and the counsel associated with me in the defence of J. T. Callender, which I now hold in my hand, and every part of which according to my best recollection is correct.

Mr. *Harper* here interrupted Mr. Hay, and said, the witness may refer to any thing done by himself at the time the occurrences happened, which he relates. But I submit it to the court how correct it is to refer to what was not done by him, or done at the time.

The *President* asked Mr. Hay whether the notes were taken by him.

Mr. *Hay*. The statement was made by different persons. Some parts were made by myself, perhaps the greater part; the rest by Mr. Nicholas and Mr. Wirt. I believe I shall be able to state from it every material occurrence which took place at the time. With regard to those parts of the statement not made by me, a reference to them will call to my recollection the facts mentioned in such parts. If I state any thing, which I do not distinctly recollect, upon adverting to the statement, I will explain the actual situation of my mind on that point.

Mr. *Nicholson*. If I understand the witness, it is not his intention to give the paper in his hand as evidence; but merely to refer to it for the purpose of refreshing his memory.

Mr. *Harper*. I do not understand the way in which it is meant to use the paper. I apprehend that it is a rule of evidence that nothing but notes made at the time of the transactions related can be received as evidence. I therefore am of opinion that a reference to this statement is inadmissible, because a part of it is made by others, and none of it made at the time.

Mr. *Rodney*. When we advert to what has been stated by the witness, who says he does not mean to state in evidence any thing in the paper, of which he has not independently of it, a distinct recollection, I think it is within the law to admit him to avail himself of it. I apprehend that had I attended the trial of Callender, and taken minutes, and others had

attended and not taken notes, if by recurring to my notes there ſhould be recalled to their recollection facts ſo diſtinctly, that they could ſwear to them before a court, it would be competent to admit their reference to ſuch notes.

Mr. *Campbell* enquired whether the objection were not confined to that part of the ſtatement not made by the witneſs.

Mr. *Harper* ſaid the objection related to the whole of it.

Mr. *Campbell* believed that a witneſs might uſe any memorandum to refreſh his memory; and that it was not neceſſary that it ſhould be made at the point of time when the events happened. It is ſufficient if made at a time when his remembrance of the facts was correct. With regard to that part not taken by himſelf, if he peruſed it at a time ſo ſhortly after the events related as to be able to determine it to be accurate, and now recogniſes the memorandum to be the ſame, it is ſufficient.

Mr. *Martin* ſaid, he had been many years in the practice of the law. The rules of evidence were probably different in different ſtates. But he had always ſuppoſed that a witneſs could not be permitted to uſe any memorandum not made by himſelf, or at the time of the events related, or near it. He may before he comes into court conſult any memorandum for the purpoſe of refreſhing his memory, but not in court.

The *Preſident*. The witneſs propoſes to make uſe of a memorandum under the circumſtances which he has ſtated. The queſtion is, ſhall the witneſs be permitted to make uſe of it?

Mr. *Adams*. I am not prepared to anſwer that queſtion at preſent, not knowing the nature of the minutes the witneſs propoſes to uſe. I therefore move that the Senate retire before the queſtion is taken.

The queſtion on retiring was taken, and, on a diviſion, loſt.

Mr. *Adams* ſaid he wiſhed to ſee the paper before he voted.

The *Preſident* aſked Mr. Hay whether it was in his own hand writing?

Mr. *Hay* replied that it was not; but that it was written by a clerk from a printed ſtatement.

Preſident. Have you the parts made by yourſelf ſeparate?

Mr. *Hay* ſaid he had not.

The *Preſident* then put the queſtion, whether the witneſs ſhould be permitted to uſe the paper?—and the queſtion being taken by Yeas and Nays, paſſed in the negative—Yeas 16. Nays 18.

Mr. *Randolph* aſked the witneſs, to ſtate to the court the circumſtances which took place during the trial of J. T. Callender, and particularly what reſpected the excuſe and teſtimony of John Baſſet.

Mr. *Hay*. I will ſtate as well as I can, what fell from the judge, and which appeared to me to be material. After ſome previous obſervations, the counſel for the traverſer claimed for their client his conſtitutional right to be tried by an impartial jury. I cannot pretend to relate preciſely either the courſe of proceeding, or the exact words which were uſed, ſince I am deprived of the aid of thoſe notes which I know to be correct. I ſhall not, therefore, recite the preciſe words, but I ſhall give the ſubſtance of them, and the words themſelves as nearly as poſſible. According to my beſt recollection judge Chaſe's declaration on that point was, that he would ſee juſtice done to the priſoner in that reſpect. In order to attain the object which the counſel for Callender had in view, we purſued this courſe. Believing that a majority of the petit jury, if not all of them, were men decidedly oppoſed to J. T. Callender, in political ſentiments, and thinking it probable from the ſtate of parties at that time, that they had made up their minds, we wiſhed to aſk every juror before he was ſworn, whether he had ever formed an opinion with reſpect to the book called the Proſpect before Us. According to my beſt recollection, judge Chaſe interfered, and told us it was not the proper queſtion; he ſaid he would tell us what the proper queſtion was. He then went on to ſtate that the proper queſtion was this: "Have you ever formed and delivered an opinion concerning the charges in this indictment?" Though I have but little dependence on my memory in general, yet in this I am certain, that I not only give the ſubſtance, but the identical words uſed. To this queſtion an anſwer was neceſſarily given in the negative.

Mr. *Key*. Who anſwered?

Mr. *Hay*. A juror.

Mr. *Key*. The whole, or what jurors. Was it the anſwer of John Baſſet, no other juror is mentioned in the ſecond article. The moment any attempt is made to extend the enquiry beyond the preciſe object of the ſecond article I will object to it.

Mr. *Randolph*. We have no objection to that courſe being purſued; as we can get all we want under the 4th article.

Mr. *Rodney*. We are examining a witneſs, who may be able to give teſtimony on the 2d, 3rd, or 4th articles.

Preſident. Will the gentleman read the article on which the witneſs is called.

Mr. *Randolph*. I do not know that we are bound to do ſo.

Preſident. The Senate deſire it.

Mr. *Randolph*. I beg pardon. I thought it was deſired on the other ſide.

Mr. *Rodney* then read the 2d, 3rd, 4th, 5th and 6th articles.

Mr. *Harper*. Our wiſh is to confine the witneſs to the *matter* charged. We only object to the *opinion* of the witneſs being given.

Preſident. It is probable, gentlemen, that nothing will ariſe in what the witneſs ſtates, that will occaſion difficulty. He will pleaſe to proceed.

Mr. *Hay*. What I was about to mention was not ſo much opinion as fact. I was proceeding to relate the facts which conſtitute the baſis of the ſecond article. When Mr. Baſſet was called by the marſhal, he manifeſted ſome repugnance to ſerving on the jury. He ſaid, according to my beſt recollection, that he was unwilling to ſerve, becauſe he had made up his mind as to that book. I do not pretend to ſay that the words uſed were preciſely thoſe I ſtate. He may have expreſſed himſelf in the words aſcribed to him by the ſtenographical ſtatement given of the trial. The objection, thus made by Mr. Baſſet, was over-ruled by judge Chaſe, who aſked him whether he had ever formed and delivered an opinion concerning the charges in the indictment. He was ſworn to anſwer this queſtion. Like the other jurors he anſwered in the negative, and the judge ordered him, like the other jurors, to be ſworn on the jury: he was ſworn, and did ſerve.

Mr. *Harper*. Was the word, uſed by the judge, *and* or *or*?

Mr. *Hay*. I am perfectly clear it was *and*, and not *or*.

In the ſtate of things at that time, and ſeeing the temper that was manifeſted on the trial, I would not, and did not, aſk the juror a ſingle queſtion without ſubmitting it to the court, and ſoliciting their permiſſion to aſk it. I ſolicited the leave of the court to aſk a queſtion. The reply of the judge was this—— The difficulty I experience at this moment in ſtating the preciſe words, furniſhes the reaſon I had for wiſhing to have recourſe to the ſtatement I had in my hand. Since I am denied that indulgence, I will not pretend to ſtate literally what was

ſaid, but I will ſtate the ſubſtance. I told the judge I wiſhed to aſk a queſtion. What, ſaid the judge, is the queſtion you want to put?—State it. If I think it a proper queſtion, or if I chooſe it, you may put it. Come, what is your queſtion? Notwithſtanding the humiliation I felt at being addreſſed in ſuch a way before a crowded audience, I aſked "have you formed (leaving out "*and delivered*,") an opinion concerning the book from which the charges in the indictment are taken."—The reply of judge Chaſe was, "no, ſir, no, you ſhall aſk no ſuch queſtion." And the queſtion was not aſked. This is all I recollect at this moment reſpecting Mr. Baſſet, and the occurrences connected with that part of the trial.

It was ſtated by Callender in his affidavit that colonel Taylor, of Caroline, was a material witneſs; but of this I am not certain, becauſe I have not read the affidavit ſince the trial. In the interval that elapſed between the day, on which the firſt motion was made, and that on which the trial took place, Tueſday, colonel Taylor was ſummoned. When he came to town I know not. I have no recollection of having ſeen him until he came into court. I had therefore no opportunity of aſcertaining whether it would be in his power to furniſh the accuſed with the evidence he expected to derive from him. After the witneſſes on the part of the United States had been adduced to prove the fact of publication, and after the attorney of the United States had opened the caſe, and ſtated the law ariſing upon the evidence, colonel Taylor was offered to the court as a witneſs. He was ſworn; and immediately after, or probably while he was ſwearing, Mr. Chaſe aſked the counſel of Callender, what they expected to prove by him. If I recollect rightly, Mr. Nicholas, one of my aſſociates, obſerved that we did not know diſtinctly what could be proved by colonel Taylor; but that we expected to prove what would amount to a juſtification of one of the counts in the indictment; that we expected to prove that Mr. Adams, the then Preſident of the United States, had avowed in converſation with colonel Taylor, ſentiments hoſtile to a republican government; and that he had voted in the Senate of the United States againſt the law for ſequeſtering Britiſh property in this country, and againſt the law for ſuſpending commercial intercourſe between the United States, and the kingdom of Great Britain. I do not recollect preciſely the words which were uſed by Mr. Nicholas in making the obſervations that accom-

panied this ſtatement; but I think he ſaid, he hoped that it would be underſtood that he was not tied down to theſe particular points, ſaying that probably the anſwers given by colonel Taylor, might ſuggeſt other queſtions proper to be put. Nor do I uſe the preciſe words in which judge Chaſe made an objection; but I do remember that the objection was made. The principle upon which he founded his objection was this; that colonel Taylor's evidence did not go to a juſtification of any one entire charge; and he declared colonel Taylor's evidence to be inadmiſſible on that ground. The judge was then aſked by Mr. Nicholas, whether we might not prove part of a charge by one witneſs, and the other part by another. The judge anſwered him, that he deſired him to underſtand the law as he had propounded it; and the law was this; that this could not be done; that colonel Taylor's evidence related only to one part of a charge, and that he could not prove one part by one evidence, and one part by another. I then obſerved to the judge, that I thought colonel Taylor's evidence admiſſible even on the principle laid down by the court; that I thought his teſtimony would go to prove both members of the ſentence; the one aſſerted that Mr. Adams was an ariſtocrat; the other that he had proved faithful and ſerviceable to the Britiſh intereſt; and that he could prove that he had heard Mr. Adams make the remarks already ſtated; and that he had proved ſerviceable to Great Britain in the way meant by the author, that is, in giving the two votes in the Senate alluded to in the work. The judge did not ſay in expreſs terms that the poſition taken at the bar was wrong, but he ſaid that the evidence of colonel Taylor was inadmiſſible, and that the counſel knew it to be ſo; and I believe it was at the ſame moment of time, he ſaid that our object was to deceive and miſlead the populace. I remember theſe expreſſions as well as if I heard them yeſterday. Finding that the attempt I had made to render a ſervice, not to the man, but to the cauſe, inſtead of affording ſervice to the cauſe, only brought on me the obloquy of the court, I felt myſelf diſguſted, and ſaid no more on the ſubject.

I recollect that we were requeſted by the judge to reduce to writing the queſtions that we wiſhed to propound to colonel Taylor. I thought the meaſure ſo novel and unprecedented that I was not diſpoſed to comply with this deſire. The queſtions were, however, ſtated in writing by Mr. Nicholas, who

obſerved that he hoped we would not be confined in the examination of the witneſs to the queſtions thus ſtated in writing. If I miſtake not, before the queſtions were reduced to writing, Mr. Nicholas made ſome obſervations about the mode purſued by the court in reference to the attorney for the United States, and that exerciſed towards the counſel for the priſoner; that the attorney for the United States had not been required to ſtate in writing the queſtions he wiſhed to aſk. When this remark was made to the judge, he ſaid that the attorney for the United States had ſtated in the opening of the caſe all that he expected to prove; "but though this were done, we were not bound to do it." My impreſſion is that that word eſcaped the judge ſeveral times.

Mr. *Nicholſon.* What word?

Mr. *Hay.* The word "we."

——————Did it refer to the court as well as the attorney?

Mr. *Hay.* So, ſir, I underſtood it.

The fourth article relates to the refuſal of the judge to poſtpone the trial on the affidavit of Callender; on which I can only ſay that the affidavit was filed, but whether regularly drawn or not I do not know. This affidavit, according to my beſt recollection, ſtated the abſence of material witneſſes.

The next article relates to a ſubject, that it is very unpleaſant to me to make any remarks upon, becauſe I feel myſelf to be a party concerned. The judge is charged with—

[Mr. *Hay* here read the 3d, 4th, and 5th clauſes of the fourth article.]

There were many expreſſions uſed by judge Chaſe during the trial which were uncommon, and which I thought, and ſtill think to be ſo. With reſpect to the aſperity with which he cenſured me, I ſhall not—

Mr. *Harper* interrupted the witneſs, and deſired him to ſtate the expreſſions, and let the court judge for themſelves.

Mr. *Hay.* The firſt expreſſion, which made a very ſtrong impreſſion on my mind, was this: In the courſe of the argument, urged by me in ſupport of the motion for a continuance to the next term, I aſſumed it as a clear poſition, that the law of the ſtate of Virginia, which directs that the jury ſhall aſſeſs the fine, would govern in this caſe. As ſoon as I got to that part of the argument the judge interrupted me, and gave me to underſtand that I was miſtaken in the law, and added, the aſſeſsment of the fine by the jury may be conformable to

your local and ſtate laws, but when applied to the federal courts, it is a "*wild notion.*" In the caſe of col. Taylor's evidence, which I have already ſtated, the judge ſaid that we knew the evidence to be inadmiſſible, though we preſſed it upon the court, and then the expreſſion followed which has been already mentioned, that we were endeavoring to miſlead and deceive the populace. At another time he was pleaſed to obſerve, gentlemen, you have all along been in error in this cauſe, and you perſiſt in preſſing your miſtakes on the court. On more occaſions than one he charged the counſel with advancing doctrines they knew to be wrong. I endeavored in one part of the cauſe to ſatisfy the court that the book called the Proſpect before Us, could not be given in evidence in ſupport of the indictment, becauſe the title of the book was not mentioned in the indictment. In ſupport of my argument, I obſerved to the court that if the indictment mentioned the book from which the charges were formed, and any ſubſequent proſecution ſhould afterwards be inſtituted, the traverſer would have nothing more to do than to produce a copy of the record, and plead it in bar of a ſubſequent proſecution; but that according to the opinion of the court, the ſituation of the traverſer would be more precarious than according to the doctrines for which I contended; for that the traverſer, if he ſhould plead a former proſecution in bar, would not be able to prove the fact by comparing the record with the indictment; but muſt reſort to extraneous evidence to prove that the ſubſequent proſecution was founded on the ſame publication that gave riſe to the firſt. The judge was pleaſed to obſerve, without ſeeming to underſtand the diſtinction that I had endeavored to draw, that I knew the preſent proſecution could be pleaded in bar. I certainly did know it, and was endeavoring at that very time to ſhew by my argument that the better mode of proving the truth of the plea would be by a copy of the record, rather than by an appeal to parole teſtimony. Judge Chaſe again interrupted me, and ſaid, I knew that this proſecution might be pleaded in bar.

In the courſe of the ſame argument, which I addreſſed to the judge, for the purpoſe of ſhewing the truth of the poſitions we had ſtated, I obſerved that according to the eſtabliſhed doctrine, the words "tenor and effect," in an indictment for a libel, bound the party to the literal recital of the parts charged as libellous. In ſupport of that opinion I quoted ſeveral

authorities that ſatisfied my mind. The judge was pleaſed to tell me, I was miſtaken in my applic ation of them; but I do not remember his preciſe words. He ſaid the words "tenor and effect" did not oblige the proſecutor to give more than the ſubſtance of the paper meant to be recited. It is contended, ſaid he, that the book ought to be copied *verbatim et literatim*, I wonder, he continued, *they* do not contend for *punctuatim* too.

Mr. *Nicholſon*. Was this obſervation addreſſed to the bar?

Mr. *Hay*. It appeared to me to be intended for the people; for he looked round the room when he ſaid with a ſarcaſtic ſmile, I wonder they do not contend for *punctuatim* too. I recollect alſo, that when Mr. Wirt, who was aſſociated with me as counſel for the traverſer, was addreſſing the court, he was ordered by judge Chaſe, to ſit down—in this preciſe language, *ſit down*. The judge alſo declared that the counſel on the part of Callender ſhould not addreſs any obſervations to the jury concerning the unconſtitutionality of the ſecond ſection of the ſedition law, in reſpect to proſecutions for libellous publications.

Mr. *S. Smith*, at this ſtage of the examination of the witneſs, moved an adjournment of the Senate to their legiſlative apartment.

The motion not being agreed to;

Mr. *Hay* proceeded.—When Mr. Wirt was arguing from a propoſition he had laid down, he ſaid the concluſion which followed was perfectly ſyllogiſtical. The judge bowed to him in a manner I cannot deſcribe, and ſaid "*A non ſequitur, ſir.*" I do not remember any other expreſſions uſed by the judge calculated to deter the counſel from proceeding in the defence of J. T. Callender. But I do remember that I was more frequently interrupted by judge Chaſe on that trial, than I have ever been interrupted during the 16 years I have practiced at the bar. I do not ſtate how often I was interrupted, becauſe I do not recollect; but I know the interruptions were frequent, and I believed them to be very unneceſſary, not only as they regarded myſelf, but the counſel who were aſſociated with me in the defence.

Mr. *Randolph*. In your teſtimony you have ſaid that during the whole courſe of the trial you never once heard the voice of judge Griffin. Were thoſe replies and thoſe deciſions, which you have detailed, given by judge Chaſe apparently without any conſultation with judge Griffin?

Mr. *Hay.* I ſtated that I did not hear the voice of judge Griffin; but I by no means meant it to be inferred that judge Griffin was not heard by any other perſon. Judge Chaſe's manner of delivering the opinion of the court was generally this:—after having ſtopped or interrupted the counſel for the traverser by telling them to ſit down, or that they were miſtaken in the law, ſometimes, but not every time, he would look at judge Griffin, who ſat upon his left hand; and turning to the bar, and to the audience, he would ſay, ſuch is the opinion of the court I think alſo, that I ſaw them ſpeaking to each other, but not in ſuch a manner as if they were conſulting upon a queſtion of law.

Mr. *Randolph.* You ſaid that the question propounded to Mr. Baſſet, and the other jurors, was, "Have you formed and delivered an opinion as to the charges contained in the indictment?"—Are you certain that the expreſſion was "formed *and* delivered?"

Mr. *Hay.* I am as clear on that point as I am of any thing that ever occurred in the courſe of my life. I have ſaid that my memory at beſt is not a good one; but ſome of the occurrences on this trial were ſo ſingular and novel, that they made an unuſual impreſſion on my mind.

Mr. *Randolph.* When it was decided by the court that the queſtion, "Have you ever formed and delivered an opinion on the charges contained in the indictment;" was the only proper queſtion, was it ſtated by the court, or requeſted by the counſel for the accuſed, that the indictment might be read?

Mr. *Hay.* It was requeſted by the counſel that the indictment might be read, that the juror might have an opportunity of aſcertaining whether he had made up his mind on the particular charges it contained.

Mr. *Randolph.* Was the indictment then read?

Mr. *Hay.* It was not then read, nor until after the jurors were ſworn,

Mr. *Randolph.* You have been, you have ſtated, a practitioner of the law for ſixteen years. Has it been the practice of the courts in Virginia, or have you ever heard of, or ſeen, an inſtance, where the queſtions propounded by counſel, were required by the court to be reduced to writing, and ſubmitted to their inſpection, before they were permitted to be put?

Mr. *Hay.* I never knew of a ſingle inſtance; nor do I remember to have even heard or read of ſuch an inſtance. I acted as the proſecutor in the trial of Logwood, charged with counterfeiting notes of the bank of the United States. The chief juſtice of the United States, who preſided at the trial, made no ſuch requiſition, nor did it ever occur to me, that ſuch a thing ought to be, or could be done.

Mr. *Nicholſon.* When you were required to reduce the queſtions to writing, was it at the inſtance of the attorney of the diſtrict, (Mr. Nelſon,) or was it by the court?

Mr. *Hay.* I do not remember that Mr. Nelſon made any objection to putting the queſtion. The objection was made only on the part of the court. I recollect that Mr. Nelſon made one remark as to the witneſs giving teſtimony on what took place in the Senate of the United States.

Mr. *Randolph.* Upon what ground did the counſel for the accuſed aſſume the right of proving the vote which was given in the Senate by parole teſtimony? to prove facts done in the Senate you ſhould have reference to their journal.

Mr. *Hay.* It will be recollected that I ſtated that colonel Taylor came into court at the time the jury was about to be ſworn; and that the counſel for the traverſer was called upon to ſtate in writing the queſtions that were to be put. Thoſe queſtions were written without any reflection on my part, as to the propriety or legality of proving the vote of the Senate by parole teſtimony.

The court roſe at 5 P. M.

TUESDAY, *February* 12, 1805.

The court met at 12 o'clock.

Present, the Managers, attended by the House of Representatives in committee of the whole: and Judge Chase, attended by his counsel.

Mr. HAY, *in continuation.*

A very ſhort ſtatement will cloſe the detail which I have to make. It was the intention of the counſel, who appeared in behalf of the traverſer, to have defended him on the ground of the unconſtitutionality of that ſection of the law, commonly

called the ſedition law, on which the indictment was founded. The gentlemen aſſociated with me in the defence proceeded to argue this point. They were not permitted to addreſs the jury reſpecting it. The treatment experienced by Mr. Wirt on this occaſion, I have already in ſome degree ſtated. I recollect he was interrupted by judge Chaſe at ſeveral times, and particularly at one of thoſe times, for the purpoſe of telling him that the doctrine he contended for was true, that the jury had the right to determine on the law as well as the fact. Mr. Wirt then went on to ſtate that the conſtitution of the United States was the law of the land. Judge Chaſe interrupted him, and ſaid there was no neceſſity for proving that point, it was the *ſupreme* law of the land. Mr. Wirt then went on to argue that if the jury had a right to determine the law in this caſe, and if the conſtitution was the ſupreme law, the concluſion was perfectly ſyllogiſtical, that the jury had a right to determine on the conſtitutionality of the law. It was at that time that judge Chaſe addreſſed him in the words that I have mentioned. According to my beſt recollection he bowed, and with an air of deriſion, addreſſing him, ſaid, "a non ſequitur, ſir." Whether Mr. Wirt ſaid any thing more after this in behalf of his client, I do not recollect; he did not, however, ſay much. After Mr. Wirt ſat down, I roſe, addreſſed myſelf to the court, and ſtated that I addreſſed myſelf to the court excluſively. I obſerved that I did not wiſh to be heard by the jury, or by the very numerous aſſemblage that ſurrounded me. This obſervation was intended by me as a ſort of reply to the obſervation made by the judge that our defence was intended for the people. I did not attempt to ſpeak to the jury on the queſtion, which I wiſhed to argue before them, but I addreſſed myſelf to the court for the purpoſe of ſatisfying them. After I had gone on for a ſhort time, I was interrupted by the judge, by a queſtion which I thought an unneceſſary one. I will endeavor to ſtate it. I ſtated to the court, in terms as diſtinct as my knowledge of the Engliſh language enabled me to uſe, the ſpecific propoſition for which I meant to contend; which was, that the jury had, according to the laws of the land, a right to determine every queſtion neceſſary to the deciſion of the queſtion of guilty or not guilty. Judge Chaſe aſked me whether I laid down that propoſition as true in civil as well as criminal caſes—becauſe, if you do, ſaid he, you are wrong. My re-

ply was that I believed the propoſition univerſally true; but it was ſufficient for my purpoſe if it were true as applied to criminal caſes. I went on, as well as I could, in the argument I intended to urge. I was again interrupted by the judge. What the circumſtances were that gave riſe to that interruption, my *unaided* memory will not enable me to tell, nor do I recollect what expreſſions were uſed by him. I have not, ſince yeſterday, taken the liberty of looking at the ſtatement, which I have in my pocket, of the circumſtances that took place on the trial; but I know that I was interrupted more than once, and I believe more than twice; but the impreſſion on my mind was, that to get through the argument, I ſhould be ſubjected to more humiliation than any man vindicating another in a court of juſtice was bound on any principle to encounter, and I declined proceeding in my argument.

When the judge perceived from the movements I was making with my papers, that I was about to retire, he aſked me to go on. I told him I ſhould not go on. He ſaid there was no occaſion for me to be captious. I told him I was not captious. He then ſaid, go on, go on—you will not be interrupted. I, however, retired from the bar, and, I believe, from the room where the court was held.

Mr. *Randolph.* Did any circumſtances occur, in relation to a witneſs brought forward on the part of the proſecution, of an unuſual nature, were any obſervations made by the court to that witneſs, and what were thoſe obſervations?

Mr. *Hay.* I do not know whether the circumſtance I am about to ſtate is an anſwer to the queſtion which has been put to me. But I recollect diſtinctly that a circumſtance did occur, which I thought extraordinary. A witneſs was brought forward, to prove the publication of the Proſpect before Us, who was the very man employed by Callender to print the work. Whether the publication could be proved by any other perſon than Callender's agents, I do not now recollect. But I ſtated to the court that this witneſs was about to do what the conſtitution authorized him to refuſe to do, and what he was not required to do by the eſtabliſhed rules of law in criminal proſecutions, which was that no man was bound to deliver teſtimony that would go to criminate himſelf; and if any thing done by him, implicated him in the tranſaction charged againſt Callender as libellous, he was not bound to anſwer, nor could he be required to anſwer by the court. Mr.

Chaſe ſaid that the opinion I had expreſſed was correct; but the witneſs, who had come forward to give evidence of the publication, might reſt aſſured that he ſhould not be moleſted for any part which he might have taken in the publication. I do not recollect that the diſtrict attorney ſaid a word on the occaſion. Every thing that was ſaid on that head was ſaid by myſelf, and anſwered by the court, as I have ſtated. The witneſs was ſworn, and gave in his teſtimony, in which he ſtated that he was employed by Callender to print the work called the Proſpect Before Us.

Mr. *Randolph.* The counſel for the accuſed ſeemed to have conſidered in this caſe, as well as in all the others, that the proceedings would be governed by the act of the ſtate of Virginia, which in virtue of the act of Congreſs of 1789, was the rule of procedure. It appears that proceſs was iſſued, ſuch as the laws of Virginia did not authoriſe. Was there no reference made by the counſel for the accuſed to the act of Virginia, to ſhew that the proceſs was illegal, or that it was contrary to law, to rule the party to trial at the ſame term the indictment was found?

Mr. *Hay.* There was a general, but not a ſpecific reference to that circumſtance. In making the motion for a continuance, I ſtated that in conformity to the law and uſage of Virginia, when a preſentment was found, the ordinary proceſs was by ſummons to the next term, and that during the interval between ſerving the proceſs, and the time at which it was returnable, the accuſed was enabled to prepare and collect matter for his defence. It is extremely probable that ſome other motion would have been made, but for an obſervation that fell from the judge, on another part of my argument. I ſtated that the jury were to aſſeſs the fine according to law; this opinion was oppoſed and denounced as a wild notion. Finding that the judge had made up his mind on that ſubject, and that the law of Virginia was not conſidered as obligatory, I had no idea of making any motion to the court founded on the doctrine which he had thus denounced. My opinion before, at that time, and at the preſent time, the opinion which I expreſſed officially on a late occaſion, is, that where the laws of the United States do not otherwiſe require or provide——

Mr. *Martin* ſaid that he apprehended this teſtimony was of no kind of conſequence.

Mr. *Hay.* I was only about to ſtate the reaſons, why nothing more was ſaid on that ſubject, or a motion founded on it.

The *Preſident.* The Senate object to that ſort of teſtimony. You will pleaſe to confine yourſelf as much as poſſible to facts.

Mr. *Hay.* I only meant to have ſtated a fact, that the expreſs declaration made by the court to the counſel for the accuſed, in relation to the doctrine juſt mentioned, put a ſtop to my mentioning any idea, or making any motion founded on that doctrine.

Mr. *Randolph.* I wiſh to aſk the witneſs, who tells us he has been ſixteen years a practitioner at the bar, whether he ever knew an inſtance, in which, in a caſe ſimilar to that of Callender, puniſhable only by fine and impriſonment, a capias was iſſued.

Mr. *Hay.* I ought to premiſe, that this queſtion relates to a branch of juriſprudence which I have not much attended to, although ſome time ſince I acted as a proſecutor for the ſtate for one of its counties. I have never known a ſingle inſtance, in which a capias has been awarded in the firſt inſtance. I believe the invariable practice is to iſſue a ſummons, and I believe it is not cuſtomary in Virginia to try a cauſe at the ſecond term, when the party appears and pleads.

Mr. *Randolph.* If it is not the practice at the ſecond term, do you mean that it is at the firſt?

Mr. *Hay,* No ſir, the preſentment is found at the firſt term; the ſummons iſſues returnable to the next; at the ſecond term the iſſue is made up and the trial comes on at the ſubſequent term. This I believe is the ordinary mode of proceeding in Virginia.

Mr. *Randolph.* Finding that the law of Virginia was not conſidered as applicable, did you move, and ſupport the motion by argument, for a continuance, founded on the affidavit filed by the accuſed, and what were thoſe arguments?

Mr. *Hay.* I do not know whether I can ſtate accurately all the arguments urged for a continuance. The argument was certainly in part founded on the affidavit of the traverſer. He ſtated that he wanted documents which he could not inſtantaneouſly procure, and material witneſſes who reſided at a great diſtance. If I recollect rightly, I ſtated when Callender was firſt carried into court, that I was not prepared to diſcuſs the important queſtion whether a jury had a right to determine on the conſtitutionality of a law. I alſo ſtated the caſe to be a new one, that a proſecution for a libel had never before occurred in Virginia, and that the gentlemen of the bar were not

maſters of the ſubject; and that therefore I wiſhed time to look into it.

Mr. *Charles Lee* was here introduced into court as counſel for judge Chaſe.

Mr. *Harper*. In your examination in chief you ſtated that you defended the cauſe and not the man. We are not capable of underſtanding your meaning, and beg you to explain it. Was it the cauſe of Callender, or was it ſome other cauſe?

Mr. *Hay*. It was the cauſe of the conſtitution, and I did not mean to defend Callender farther than he was connected with that cauſe.

Mr. *Harper*. Your object appears to have been to ſhew that the law under which he was indicted was unconſtitutional?

Mr. *Hay*. That was one great cauſe.

Mr. *Harper*. Not the ſole one?

Mr. *Hay*. I had previouſly made up my mind, that if a proſecution ſhould take place in Virginia under that law, I for one would ſtep forward and offer my ſervices to the perſon who ſhould be ſelected as its firſt victim.

Mr. *Harper*. You ſaid that you referred, when making a motion for a continuance, generally to the law, but not ſpecifically to the law of Virginia?

Mr. *Hay*. My meaning was, that I did not quote the preciſe title of the act, but made a general reference to it.

Mr. *Harper*. Without citing the particular law?

Mr. *Hay*. Without citing it, I made no other than a general reference to the law.

Mr. *Harper*. Do you recollect, whether on the ſubject of col. Taylor's teſtimony, judge Chaſe applied to Mr. Nelſon, the attorney of the diſtrict, to determine whether the teſtimony ſhould be admitted?

Mr. *Hay*. I have ſome indiſtinct recollection of ſome ſuch thing.

Mr. *Harper*. Did not judge Chaſe offer to poſtpone the cauſe for a month or more?

Mr. *Hay*. I have no recollection of ſuch an offer; it would have been the wiſh of the counſel for the accuſed to have obtained that delay. I know that, in conſequence of an impreſſion on my mind, that a poſtponement could not be obtained, I devoted my days and nights to make myſelf acquainted with the ſubject, previous to the day when the trial came on.

I have no recollection of ſuch an offer; if I had ſo underſtood it at the time, I ſhould have availed myſelf of it.

Mr. *Harper.* Did the counſel of Callender aſk for a poſtponement, independently of a continuance to the next term?

Mr. *Hay.* I do not recollect that they did.

The *Preſident.* You ſay ſome converſation appeared to paſs between judge Chaſe and judge Griffin; did you hear ſo much as to underſtand the ſubſtance of it?

Mr. *Hay.* No, ſir.

Preſident. How then did you draw the inference?

Mr. *Hay.* From the buſineſs then before them.

Preſident. You ſpoke of a witneſs called by the name of Rind. Did he appear willing to give teſtimony?

Mr. *Hay.* He did not appear unwilling. The objection to his teſtimony was made by myſelf.

JOHN TAYLOR *ſworn.*

Mr. *Randolph.* The witneſs will pleaſe to ſtate the circumſtances that paſſed in the rejection of his teſtimony, and other circumſtances which have any relation to the conduct of judge Chaſe on the trial of Callender?

Mr. *Taylor.* I was ſummoned as a witneſs on that trial on the part of Callender. I attended and was ſworn. On being ſworn, judge Chaſe enquired what it was intended to prove by my teſtimony? I do not recollect the expreſſions of judge Chaſe, nor do I recollect preciſely the anſwer made to this enquiry; but judge Chaſe deſired the counſel for the accuſed to reduce their queſtions to writing. They did ſo.

[Col. Taylor's teſtimony was here ſo indiſtinctly heard, that we could not collect his words.]

I had come into court very near the hour when the court met, nor had I previouſly given any intimation of the teſtimony I could give either to Callender or his counſel. I ſhould have added that after, I think, the judge had declared the witneſs could not be examined, he applied to the diſtrict judge for his opinion; who replied in ſo low a voice, that I could not tell what he ſaid. But this was after he had given his own opinion that my teſtimony could not be received.

Mr. *Randolph.* You ſtate that neither the accuſed nor his counſel knew the extent to which your teſtimony would go. Would your teſtimony, according to your belief, have had a material bearing on the charges againſt Callender?

Mr. *Martin* objecting to this queſtion, Mr. Randolph ſaid he would withdraw it.

Mr. *Randolph.* Did you obſerve any thing unuſual in conducting the trial?

Mr. *Taylor.* One or more motions were made by the counſel for Callender, who was interrupted by judge Chaſe repeatedly. The words in which theſe interruptions were couched, I cannot recollect, though I formed an opinion of the ſtyle and manner of them; the effect of which was to produce laughter in the audience at the expense of the counſel. If I am required to declare the character in which I conceived them to be made, I am ready to do ſo.

There was here a ſhort pauſe, when judge Chaſe roſe and ſaid he had no objection to the opinion of the witneſs being delivered.

Mr. *Taylor.* I thought the interruptions were in a very high degree imperative, ſatirical, and witty.

Mr. *Randolph.* Did there appear to you any thing unuſual in the manner of the counſel for the accuſed towards the court?

Mr. *Taylor.* I neither diſcovered the leaſt degree of provocation given by the counſel, nor perceived any anger expreſſed by the court. Judge Griffin was ſilent, nor were judge Chaſe's interruptions accompanied by the indication of any anger as far as I could perceive.

To an interrogatory made, Mr. Taylor ſaid the interruptions of the court were extremely well calculated to abaſh and diſconcert counſel.

Mr. *Randolph.* Do you recollect any thing in relation to the objection taken by John Baſſet to ſerving as a juror?

Mr. *Taylor.* I by no means recollect the circumſtances with preciſion, but the impreſſion on my mind is ſtrong, that Baſſet ſaid that he had entertained ſome prepoſſeſſion againſt the book called The Proſpect before Us, or againſt Callender, and that the judge enquired whether he had any prepoſſeſſion in regard to the charges in the indictment. He ſaid no: and it was alſo ſaid by him or by ſome other perſon brought forward as a juror, that he had not read the indictment. Judge Chaſe ordered him to be ſworn.

Mr. *Randolph.* You were, I believe, a long time a practitioner of the law in the courts of Virgina?

Mr. *Taylor.* For a few years—about ſeven I practiſed the law.

Mr. *Randolph.* I will aſk you if you have ever known a capias iſſued againſt a perſon indicted for an offence not capital, or a perſon, preſented for ſuch an offence, tried at the ſame term the preſentment was made?

Mr. *Taylor.* I muſt anſwer in the negative, but it is proper to remark that, as I never turned my attention to the practice of the criminal law, no great reliance ought on this point to be placed on my anſwer.

Mr. *Randolph.* Has it ever been the practice in the courts of Virginia for counſel to be compelled to reduce to writing, queſtions which they wiſh to propound, and ſubmit them previouſly to the court?

Mr. *Taylor.* I have never ſeen ſuch a practice in a caſe like that of Callender.

Mr. *Randolph.* Do you remember a queſtion put by Mr. Chaſe to the counſel on the part of the United States with regard to permitting your teſtimony to be received?

Mr. *Taylor.* After the deciſion of the court, I do recollect Mr. Chaſe did expreſs ſome ſuch idea as that intimated in the queſtion. The attorney for the diſtrict inſtantly expreſſed his diſſent to what I conceived to have been in a very feeble manner recommended by the judge.

Mr. *Randolph.* This intimation was after the poſitive rejection by the court?

Mr. *Taylor.* I think ſo, although I will not be poſitive, as I made no memorandum of what occurred.

Mr. *Randolph.* Was you preſent when a motion for a continuance was made, and do you recollect the grounds of it?

Mr. *Taylor.* I only recollect that it was founded on the affidavit of Callender: I have no recollection of the arguments uſed.

Mr. *Nicholſon.* Do you recollect the grounds of the court for rejecting your teſtimony?

Mr. *Taylor.* I think on the ground that though it were admitted, it would not acquit the accuſed.

Mr. *Randolph.* Was any obſervation made perſonally to you after the teſtimony was rejected?

Mr. *Taylor.* None, ſir.

Mr. *Harper.* You have ſaid, you conſidered the interruptions of the court as highly calculated to abaſh the counſel; did you mean thereby to give your opinion that they were ſo intended, or that ſuch was their tendency?

Mr. *Taylor*. I thought they were ſo intended, and they had their full effect. They were followed by a great deal of mirth in the audience. The audience laughed, but the counſel never laughed at all.

PHILIP N. NICHOLAS *ſworn.*

In the year 1800, in the month of May, the circuit court of the United States ſat at Richmond. Of this court Mr. Chaſe and Mr. Griffin were the judges. I believe Mr. Chaſe ſat alone for ſome time, for how long I do not recollect. Mr. Griffin did not, I believe, take his ſeat until the motion to continue the cauſe was renewed. On the firſt day of the court judge Chaſe delivered a charge to the grand jury, and called their attention in a particular manner to infractions of the ſedition law. The grand jury returned with a preſentment againſt James Thompſon Callender, for a libel againſt the Preſident by the publication of a work entitled "The Proſpect before Us." On this preſentment the attorney for the diſtrict filed an indictment which the grand jury found a true bill.

Proceſs was immediately iſſued on the indictment. My impreſſion at the time and until very lately was that the proceſs iſſued was a bench warrant. I have lately heard that it was a capias. For ſeveral days it was believed that Callender, who reſided at Peterſburg, could not be found, but the marſhal at length arreſted him and brought him into court. Mr. Hay and myſelf undertook his defence. My motive was that I believed the ſedition law unconſtitutional, and of courſe oppreſſive to any perſon proſecuted under it.

Mr. Hay and myſelf had an interview with Callender, in order to aſcertain the grounds on which he expected to make his defence. Callender informed us that his witneſſes were conſiderably diſperſed, and that there were many documents which it would be neceſſary for him to obtain before he could be prepared for his trial. An affidavit was drawn, ſtating the abſence of Callender's witneſſes, the want of the documents, and that the counſel could not be prepared during that term. On this affidavit was founded the motion to continue the cauſe. This motion was urged with great earneſtneſs and zeal, as we were convinced that juſtice could not be done, if the caſe was tried during that term. The arguments princi-

pally urged by us were, that the defendant had a conſtitutional right to compulſory proceſs for his witneſſes, and to counſel, but that theſe privileges would be nugatory, if the court would not allow time to ſummon the witneſſes, and for counſel to prepare for the defence.

When the motion was firſt made, Mr. Chaſe ſat alone; he did not abſolutely reject the motion for a continuance, but he intimated in pretty ſtrong terms his opinion that the affidavit did not afford a ſufficient ground to continue the cauſe. Mr. Chaſe obſerved that the evidence of Mr. Giles, as ſtated in the affidavit, was of a ſerious nature, that he would let the cauſe lie over till Monday, and in the mean time we might ſummon ſuch of our witneſſes as were acceſſible to us. On Monday Mr. Giles did not attend. Mr. Hay ſtated to the court that the badneſs of the weather during the preceding day had probably prevented Mr. Giles's attendance, and aſked that the cauſe might lie over a few hours. The judge ſaid we might either let it lie a few hours, or until next day at our option: the latter was preferred. On Tueſday the motion was renewed to continue the cauſe. Amongſt other arguments uſed in ſupport of this motion, Mr. Hay obſerved, that by the laws of Virginia a perſon indicted for a miſdemeanor was never tried at the term at which the indictment was found; but that a ſummons iſſued againſt him returnable to the next term.

Mr. Hay farther ſtated, that as the ſedition law gave the party accuſed the right to give the truth of the matter charged as libellous in evidence, it reſulted that the law meant only to include the caſe of facts falſely recited, and not the caſe of abuſe or erroneous opinions; becauſe they are not ſuſceptible of proof, and their verity or falſehood would depend on the particular courſe of thinking of thoſe who were to judge in the caſe. Mr. Hay ſaid he wiſhed time to deliberate maturely on this view of the ſedition law, and ſaid that if his conſtruction was correct, the jury in aſſeſſing the fine ought not to regard ſuch parts of the indictment as related to mere matters of opinion. Here judge Chaſe interrupted Mr. Hay, and told him he was miſtaken in ſuppoſing the jury were to aſſeſs the fine; this may be the caſe, ſaid he, by your local ſtate laws, but as applied to the courts of the United States, it is a wild notion. Mr. Chaſe ſaid the cauſe muſt come on, that the traverſer had not ſtated in his affidavit that he could prove all the charges in the indictment to be true, that it was ne-

ceſſary for him to prove the truth of all to obtain his acquittal, and that as the abſent witneſſes were to give evidence as to part of the charges only, their abſence afforded no good reaſon for a continuance. The motion to continue the caſe was over-ruled, and judge Chaſe directed the jury to be called. When the jury came to the book, I ſtated to the court that I believed there was ground of challenge to the pannel, in conſequence of one of the jurors who were returned having expreſſed opinions very hoſtile to the traverſer. Mr. Chaſe, after looking into an authority which I quoted, and alſo into Coke Littleton, ſaid the law was clear, that our objection did not apply to the pannel, but to the individual juror; he further ſaid we muſt proceed regularly, that we might either introduce teſtimony to prove that a particular juror had expreſſed an opinion on the caſe, or we might examine the jurors as they came to the book. We preferred the latter mode, and Mr. Hay aſked if he might aſk a queſtion of the firſt juror who was ſworn. Mr. Chaſe ſaid that Mr. Hay muſt ſubmit the queſtion to his previous inſpection, and that if he thought it a proper queſtion it might be aſked. Mr. Hay ſtated that the queſtion, which he wiſhed to aſk, was, have you ever formed an opinion on the work, entitled "The Proſpect Before Us," from which the charges in the indictment were extracted? Judge Chaſe ſaid that the counſel ſhould not aſk that queſtion, that the only proper queſtion was, have you ever formed and delivered an opinion on the charges in the indictment? I ſay (continued the judge,) formed and delivered; for it is not only neceſſary that he ſhould have formed, but alſo delivered an opnion, to exclude the juror. The judge propounded the laſt mentioned queſtion to the firſt juror, and he replied that he had never ſeen the indictment, or heard it read. The judge ſaid he was a good juror, and defired he might be ſworn. Mr. Hay requeſted that the indictment might be read to the juror, that he might be thereby enabled to ſay whether he had formed and delivered an opinion on the indictment. The judge replied, that he had already indulged the counſel as much as he could and they ought to be ſatisfied; he refuſed to let the indictment be read to the juror. The clerk then called the jury and ſwore them, till he came to John Baſſet, who in reply to the previous queſtion ſaid, that he had never ſeen the indictment, or heard it read. But Mr. Baſſet ſeemed to have conſiderable ſcruple at ſerving, and ſaid he had formed and delivered an

opinion that the book called the Proſpect before Us, came within the ſedition law. Judge Chaſe, however, ſaid he was a good juror, and he was ſworn and ſerved as ſuch. The witneſſes on the part of the proſecution were called and ſworn, and amongſt others Mr. Rind was examined to prove the publication of the Proſpect before Us. Mr. Hay obſerved that no witneſs, who was any way concerned in the printing of the proſpect, was bound to criminate himſelf. Mr. Chaſe admitted this to be correct, but declared that the witneſſes might reſt aſſured that no perſon would be proſecuted in conſequence of any evidence given in the caſe then before the court. Under theſe circumſtances Mr. Rind proved that he had printed part of the proſpect for Callender, and took out of his pocket ſome of the original ſheets from which he had printed parts of the work. Judge Chaſe himſelf compared theſe ſheets with the work as publiſhed, and they were found to correſpond. After the teſtimony on the part of the proſecution was finiſhed, Col. Taylor of Caroline was called on the part of the traverſer, and after he was ſworn, judge Chaſe aſked with apparent haſte and earneſtneſs of manner, what we expected to prove by that witneſs. We ſaid we expected to prove that Mr. Adams had avowed in the preſence of the witneſs ſentiments favorable to monarchy or ariſtocracy, and that he had voted in the Senate againſt the ſequeſtration of Britiſh debts, and the ſuſpenſion of commercial intercourſe with Great Britain. Judge Chaſe then ſaid that we muſt reduce the queſtions to writing. This I objected to, and ſtated that it was a thing very unuſual in our courts, that it had not been required by the court of the diſtrict attorney, when he examined witneſſes againſt Callender, that it involved a dangerous principle, and was calculated to ſubject every queſtion of fact to the controul of the court; beſides I added that I did not know the extent to which col. Taylor's evidence would go, that I wiſhed him to ſtate all he knew, and that very probably the examination would point out new queſtions proper to be aſked. I then ſtated that if the court inſiſted on the queſtions being reduced to writing, I would comply with their direction, but that I hoped it would not be conſidered as precluding us from aſking any additional queſtions. The queſtions were then reduced to writing, and are as follow, viz:

1. Did you ever hear Mr. Adams expreſs any ſentiments favorable to monarchy or ariſtocracy, and what were they?

2. Did you ever hear Mr. Adams, whilſt Vice-Preſident, expreſs his diſapprobation of the funding ſyſtem?

3. Do you know whether Mr. Adams did not in the year 1794, vote againſt the ſequeſtration of Britiſh debts, and the ſuſpenſion of intercourſe with Great Britain?

Judge Chaſe, after examining the queſtions, declared col. Taylor's evidence inadmiſſible. No evidence can be received, ſaid the judge, which does not go to juſtify the whole charge; the charge is, that the Preſident is a profeſſed ariſtocrat, and has proved faithful and ſerviceable to the Britiſh intereſt. Now, you muſt prove both theſe points, or you prove nothing, and as your evidence relates to one only, it cannot be received; you muſt prove all or none. Theſe, I believe, were the preciſe words of the judge. I think it right here to ſtate that after Mr. Chaſe had declared colonel Taylor's evidence inadmiſſible, he ſaid to the diſtrict attorney, that although the queſtions were improper, he wiſhed the attorney would conſent to let them be aſked of the witneſs. The attorney ſaid, he could not conſent. The evidence of colonel Taylor being excluded, the attorney for the United States addreſſed the jury, and commented at conſiderable length on the indictment. After that, Mr. Wirt addreſſed the jury for the defendant. He premiſed that the counſel for the traverſer were placed in a very embarraſſed ſituation; that the priſoner during the ſame term was preſented, indicted, arreſted, arraigned, tried; and that this precipitation precluded the poſſibility of obtaining witneſſes or making the neceſſary preparations for arguing a cauſe of ſo much magnitude. Here judge Chaſe interrupted Mr. Wirt, and told him, that he would not ſuffer any thing to be ſaid which reflected on the court. Mr. Wirt ſaid he did not mean to reflect on the court, his object was only to apologize to the jury for the lameneſs of the defence. Mr. Chaſe replied that his apology contained the very reflection he diſclaimed, and deſired him to go on with the cauſe. Mr. Wirt then ſaid, that an act of aſſembly had adopted the common law of England as a part of the laws of Virginia, that an act of Congreſs had directed the United States courts ſitting in Virginia to conform to the laws of the ſtate in which ſuch court might happen to ſit, that by the common law the jury had a right to decide on the law as well as the fact; he then ſaid, that if the jury upon enquiry ſhould find the ſedition law unconſtitutional, they would not con-

ſider it as law, and if they did, they would violate their oaths. Here Mr. Chaſe ſaid to Mr. Wirt, ſit down ſir. Mr. Wirt endeavored to explain, and ſaid I am going on, ſir, to—No ſir, ſaid Mr. Chaſe, you are not going on, I am going on. Judge Chaſe then read from a paper, which he held in his hand, an inſtruction to the counſel that they ſhould not addreſs the jury on the conſtitutionality of the act of Congreſs, but that arguments might be addreſſed to the court to prove the right of the jury to conſider the conſtitutionality. Mr. Wirt then addreſſed the court. He ſaid he had not conſidered the caſe elaborately, that it appeared to him ſo clearly that the jury had the right contended for, that he did not imagine it required any great reſearch to prove it. He then proceeded to ſtate that it was certainly the right of the jury to conſider of and determine both law and fact. Mr. Chaſe here remarked that Mr. Wirt need not give himſelf trouble on that point; we all know, ſaid he, that the jury have a right to decide the law. Mr. Wirt then ſaid he ſuppoſed it equally clear that the conſtitution is the law. Yes, ſir, ſaid Mr. Chaſe, the ſupreme law. If then, ſaid Mr. Wirt, the jury have a right to decide on the law, and if the conſtitution is law, it follows ſyllogiſtically that they have a right to decide on the conſtitutionality of the law in queſtion. *A non ſequitur*, ſir, ſaid judge Chaſe. Here Mr. Wirt ſat down.

I followed Mr. Wirt, and ſpoke conciſely to prove the right of the jury to decide on the conſtitutionality of the ſedition act. I believe I was not interrupted.

Mr. Hay followed on the ſame ſide, and in the courſe of the diſcuſſion laid down the poſition, that the jury had a right to decide the law as well as the fact. Mr. Chaſe interrupted him, to aſk whether he meant to extend his poſition to civil as well as criminal caſes; for if you do, ſir, ſaid the judge, you are wrong; it is not law. Mr. Hay ſaid he believed the poſition to be univerſally true, but it was ſufficient for his purpoſe if it was true in criminal caſes. Mr. Hay proceeded a very little way further, before he was again interrupted by judge Chaſe. Mr. Hay, who had been during the cauſe frequently interrupted, then folded up his papers, and appeared to be retiring from the bar. Mr. Chaſe, addreſſing him, ſaid, go on ſir. No ſir, ſaid Mr. Hay, I will not go. What, ſir, ſaid Mr. Chaſe, will not you proceed with your cauſe? No, ſir,

ſaid Mr. Hay: my mind is made up, and I will not proceed. The judge told Mr. Hay he need not be captious. Mr. Hay replied, he was not captious. The judge ſaid, go on, ſir; proceed, and you ſhall not again be interrupted, you may ſay what you pleaſe.

Mr. Hay, Mr. Wirt, and myſelf left the bar at the ſame moment, and I cannot ſtate what happened after with any degree of certainty; Callender was however convicted.

Mr. *Randolph.* When you obſerved to the court, at the time you were directed to reduce your queſtions to writing, that the attorney for the United States had not been required to do the ſame, was there any reply made by judge Chaſe?

Mr. *Nicholas.* It was, I believe, ſtated by judge Chaſe that the attorney for the United States had at the opening ſtated what he expected to prove by his witneſſes.

Mr. *Randolph.* Did you hear any offer made by the court to poſtpone the trial of Callender for a month?

Mr. *Nicholas.* No ſir, I did not hear ſuch an offer, and I never heard it ſuggeſted until within a week or two, that ſuch an offer was alleged to have been made. If ſuch an offer had been made, I am ſure we ſhould have accepted it, as I know very well that a poſtponement would have been the moſt acceptable thing to us, except a continuance until the next term.

Mr. *Randolph.* Did the opinion of the court appear to be given after conſulting with the diſtrict judge?

Mr. *Nicholas.* I never ſaw judge Chaſe conſult judge Griffin but once, and that was after he had declared colonel Taylor's evidence inadmiſſible; he turned to judge Griffin, and aſked whether his brother judge agreed with him, to which judge Griffin aſſented.

Mr. *Randolph.* Did judge Chaſe make uſe of any rude, unuſual, and contemptuous expreſſions to the counſel, and what were they?

Mr. *Nicholas.* I recollect when he over-ruled colonel Taylor's evidence, he ſaid, my country has made me a judge, and it is my duty to pronounce the law, the evidence of the witneſs is inadmiſſible, the counſel for the traverſer know it to be ſo, but they wiſh to deceive and miſlead the populace. I take the reſponſibility of this deciſion on myſelf, and ſay the evidence cannot be received.

At another time, Mr. Chaſe told the counſel, that they had

all along miſtaken this buſineſs, and kept preſſing their miſtakes on the court; and ſaid repeatedly that what we urged as law, we knew not to be law. Many remarks of a ſimilar nature were made, and in many inſtances the judge ſeemed to endeavor to throw ridicule on the counſel. When Mr. Hay was endeavoring to prove that the declaration in the indictment, that the libel was of the tenor and effect following, held the proſecutor to a ſtrict and literal recital, Mr. Chaſe ſaid that it was not law; the counſel have contended, ſaid he, that the recital ought to have been *verbatim et literatim;* I wonder, continued he, that they have not contended for *punctuatim* alſo. In another inſtance, when Mr. Hay was adducing authorities to ſhew that the title of the book ought to have been ſtated in the indictment, Mr. Chaſe obſerved he knew there were caſes in which the title was recited. I remember one, continued he, in the caſe called the Nun in her Smock; but though it was recited in that caſe, it was not neceſſary, nor is it ſo in any caſe. It is difficult in language to convey an adequate idea of Mr. Chaſe's manner; but in theſe and ſimilar inſtances, from the ſarcaſtic way in which he expreſſed himſelf, it was evidently his intention to throw ridicule on the counſel.

Mr. *Randolph.* You ſay that on the rejection of colonel Taylor's evidence, judge Griffin was conſulted by judge Chaſe; was he conſulted before, or after the opinion of the court was pronounced?

Mr. *Nicholas.* It was after.

Mr. *Randolph.* In ſpeaking of the diſtrict attorney, who, he ſaid, had in opening the caſe ſtated the purpoſe for which he meant to introduce the witneſſes, do you recollect that he ſaid *we* were not bound to do this, and by the word *we* identifying himſelf with the public proſecutor?

Mr. *Nicholas.* I recollect that judge Chaſe in the courſe of the trial uſed the term *we* in the manner alluded to; but I do not recollect with certainty in what part of the trial it was.

Mr. *Randolph.* Were you attorney general of the ſtate of Virginia at that time?

Mr. *Nicholas.* I was, ſir.

Mr. *Randolph.* Did judge Chaſe apply the epithet young men or young gentlemen, to you and the other counſel for the traverſer?

Mr. *Nicholas.* I do not perfectly recollect whether he ſaid young men or young gentlemen. I believe the latter, and as applied to me, it was true, for I was then a very young man.

Mr. *Randolph.* Is it the practice in Virginia to iſſue a capias to take the body of the party on preſentments for miſdemeanors at the term when the preſentment is made, or the indictment found?

Mr. *Nicholas.* By our act of aſſembly the proceedings on an indictment or information for a miſdemeanor, is by ſummons returnable to the next term, and if the ſummons is returned executed, and the party does not appear, a capias is awarded returnable to the ſucceeding term. If the party comes in and pleads, his plea is received, and the cauſe ſtands over to the next term.

Mr. *Randolph.* Did you ever know the party in ſuch caſe ruled to trial the ſame term the preſentment was made?

Mr. *Nicholas.* Never.

Mr. *Randolph.* Did the counſel for the traverſer refer to the act of aſſembly, by which a ſummons is declared to be the proper proceſs?

Mr. *Nicholas.* Mr. Hay mentioned it in his argument for a continuance; he ſaid that as the laws of Virginia pointed out a ſummons as the proper proceſs, and there was no act of Congreſs directing a different procedure, he thought the United States courts ſhould allow the ſame time which the ſtate laws did.

Mr. *Harper.* When you ſay that Mr. Hay referred to the law in queſtion, do you mean he cited the particular act of aſſembly?

Mr. *Nicholas.* No, ſir, he referred generally to the Virginia laws, and ſaid ſuch was the proceſs pointed out by them.

Mr. *Harper.* You ſaid that the term *we* was uſed by Mr. Chaſe; how did you underſtand him to apply the expreſſion?

Mr. *Nicholas.* I thought he identified himſelf with the proſecution.

Mr. *Harper.* In what part of the trial did this take place?

Mr. *Nicholas.* I do not particularly recollect, but I am ſure he uſed the term *we* in the ſenſe ſtated.

Mr. *Harper.* Is it unuſual to give teſtimony by a perſon concerned in the commiſſion of the offence for which another is indicted, and do you not as attorney general of Virginia

conſider it your duty to promiſe a witneſs in ſuch caſe that he ſhall not be proſecuted for any thing he may then teſtify?

Mr. *Nicholas*. No caſe has occurred ſince I have been in office in which ſuch promiſe was made.

Mr. *Harper*. Are you correct, ſir—do you particularly remember whether you was attorney general of Virginia at the time of the trial?

Mr. *Nicholas*. I certainly was—I had been a ſhort time before the trial appointed by the executive, ſubject to the approbation, or rejection of the next legiſlature.

Mr. *Nicholſon*. You ſay the counſel were frequently interrupted, pray how frequently?

Mr. *Nicholas*. The counſel were frequently interrupted during the trial; and as a general character of the trial, I can ſay that, on moſt of the points which were made, not many ſentences were uttered by the counſel at a time without interruption.

The *Preſident*. Were you preſent when the proceſs was ruled againſt Callender?

Mr. *Nicholas*. I believe proceſs was awarded whilſt the court was ſitting, but my impreſſion at the time was that it was a bench warrant.

The *Preſident*. Was any thing ſaid in court againſt its being iſſued?

Mr. *Nicholas*. There was not.

The *Preſident*. By whom was the proceſs made out?

Mr. *Nicholas*. I do not poſitively know. I ſuppoſe it was made out by the clerk, but whether by the particular direction of the court, or under an idea that it was of courſe, I do not know.

JOHN THOMSON MASON *ſworn.*

Mr. *Randolph*. It has been contended on the part of the reſpondent, that the *quo animo* determines the guilt or innocence of an action; now, if the *quo animo* with which he went down to Richmond to execute the ſedition law, can be ſhown, it will have an important bearing on his conduct. I wiſh therefore to aſk the witneſs this queſtion: Did you ever hear judge Chaſe, previous to the trial of Callender, utter any expreſſion, and if any, what was it, on the ſubject of Callender's proſecution, or reſpecting the book called the Proſpect

Before Us; did he ſay that the counſel at the Virginia bar were afraid to preſs the execution of any law, and particularly the ſedition law; did he ſay he had a copy of that book, or what did he ſay? State the circumſtances particularly.

Mr. *Maſon.* The queſtion refers to circumſtances of which I have but an indiſtinct recollection, and which happened in a way, which renders it extremely unpleaſant on my part to relate them. Judge Chaſe preſided in the circuit court held at Annapolis in the ſpring of the year 1800; during the term a man by the name of Saunders, was tried for larceny and found guilty. After ſentence was paſſed upon him, he was taken out of court to receive it. The preſs of the people being very great, the judges and myſelf were detained within the room. Judge Wincheſter, judge Chaſe and myſelf had a converſation, altogether of a jocular complexion. I think it was juſt after he delivered his valedictory, but how to connect the circumſtances at this time, I do not know. I remember, however, that he aſked me my opinion of the book called the Proſpect Before Us; I told him I had not ſeen it, and from the character I had heard of it, I never wiſhed to ſee it. He told me in reply, that Mr. Luther Martin had ſent a copy to him, and had ſcored the parts that were libellous, and that he would carry it to Richmond with him as a proper ſubject for proſecution. There was a good deal of converſation beſides, but I do not recollect it. There was one expreſſion, however, that he uſed, which juſt occurs to my memory, and which I will repeat, that before he left Richmond, he would teach the people to diſtinguiſh between the liberty and licentiouſneſs of the preſs. He ſaid that he was as ſincere a friend to the liberty, as he was an enemy to the licentiouſneſs of the preſs. There was a ſentiment he expreſſed, which I cannot undertake to give in his preciſe words, that if the commonwealth or its inhabitants were not too depraved to furniſh a jury of good and reſpectable men, he would certainly puniſh Callender. I do not preciſely recollect the words: I never repeated this converſation before, and ſeldom or ever after it occurred, thought of it.

JOHN HEATH *ſworn.*

During the trial of J. T. Callender, I attended at the court in Richmond as one of the bar. I had occaſion to apply to

the court for an injunction. The motion not having been decided upon, I went round to Crouch's, where judge Chaſe lodged, and found him in his chamber alone, in which I thought myſelf very fortunate. We then talked over the application I had made the day before for an injunction; while talking on it, Mr. David M. Randolph, the then marſhal, ſtepped in with a paper in his hand. The judge accoſted him, and aſked what he had in his hand. He ſaid that he had the pannel of the petit jury ſummoned for the trial of Callender. This was after the indictment was found by the grand jury. After Mr. Randolph had mentioned that it was the pannel of the petit jury that he had in his hand, judge Chaſe immediately replied, have you any of thoſe creatures called democrats on the pannel. Mr. Randolph heſitated for a moment, and then ſaid that he had not made any diſcrimination in ſummoning the petit jury. Jude Chaſe ſaid, look it over, ſir, and if there are any of that deſcription, ſtrike them off. This is all I know of this affair.

The court roſe at 4 o'clock.

WEDNESDAY, *February* 13.

The court was opened at half past 2 o'clock.

Present, the Managers, attended by the House of Representatives in committee of the whole; and Judge Chase, attended by his counsel.

JAMES TRIPLETT *ſworn.*

Mr. *Randolph.* I wiſh to know whether you ever heard previous to, or during the trial of Callender any expreſſions uſed by the reſpondent judge Chaſe, manifeſting an hoſtility towards J. T. Callender, and what were thoſe expreſſions?

Mr. *Triplett.* I recollect to have had a converſation with judge Chaſe on our paſſage in the ſtage down to Richmond. A book was handed to me by him, and I was aſked if I had read it. I was aſked whether I had ever ſeen him (Callender). I told him, I never had ſeen him. There was a ſtory recited about the arreſt of Callender by a warrant of a magiſtrate under the vagrant act of Virginia—I recollect that the judge's reply was "it is a pity you have not hanged the raſcal."

Mr. *Randolph.* Was there any other expreſſions of this nature uſed, after you got to Richmond?

Mr. *Triplett.* I did not hear any thing particular; but I think the judge did ſay ſomething about the government of the United States ſhewing too much lenity towards ſuch renegadoes. I do not recollect any other converſation paſſing between us at that time, until after the court was ſitting, when judge Chaſe was the firſt who informed me of the preſentment being made by the grand jury againſt Callender. At the ſame time he informed me that he expected I would have the pleaſure of ſeeing Callender next day before ſun-down, that the marſhal had that day ſtarted after him for Peterſburg.

Mr. *Randolph.* We wiſh you as well as your memory ſerves, to ſtate not only the ſubſtance, but the exact expreſſions uſed by the judge.

Mr. *Triplett.* I will ſtate them as well as my memory ſerves me. Some time after this converſation, I met the judge at the place where he boarded; he ſaid that the marſhal had returned without Callender, and uſed this expreſſion, I am afraid we ſhall not be able to get the damned raſcal at this court.

Mr. *Randolph.* You ſay a copy of this book was handed to you by judge Chaſe. Did you read it, ſir?

Mr. *Triplett.* I read ſeveral paſſages of it.

Mr. *Randolph.* Were they marked?

Mr. *Triplett.* I ſaw ſeveral paſſages marked; but by whom I do not know.

Mr. *Randolph.* Do you remember any particular paſſages that were marked?

Mr. *Triplett.* I do not. I have ſtated every thing I recollect; but if the gentlemen have any queſtions to aſk I am ready to give them an anſwer.

Mr. *Martin.* I will aſk how many days you reſided at the ſame houſe with the judge?

Mr. *Triplett.* I think, ſix days.

Mr. *Martin.* Do you recollect whether my name was not marked on the book, which judge Chaſe handed to you?

Mr. *Triplett.* I do not.

Mr. *Harper.* Can you ſtate the day of the month, or of the week, when the laſt converſation paſſed?

Mr. *Triplett.* I think it was Sunday, but I am not poſitive. I made no minutes, as I never expected to be called upon to anſwer enquiries of this kind.

Mr. *Harper.* How long was it after the firſt converſation with the judge, when he mentioned that the marſhal had gone after Callender?

Mr. *Triplett.* I do not preciſely recollect. It was not, I think, ſo much as three days. I do not think it was ſo much as two days; but I cannot be poſitive, after ſo great a length of time has elapſed.

Mr. *Harper.* Do you recollect who travelled with you in the ſtage from Dumfries to Richmond?

Mr. *Triplett.* I cannot recollect.—The ſtage was much crouded from Dumfries to Frederickſburg; and there was a paſſenger taken in at Stafford court-houſe.

Mr. *Harper.* Well, ſir, how was it from Fredericksburg to Richmond?

Mr. *Triplett.* I do not particularly recollect; but there were paſſengers repeatedly getting in all the way.

Mr. *Harper.* Did this converſation take place before you reached Stafford court-houſe?

Mr. *Triplett.* It was after.

Mr. *Harper.* Was it between Frederickſburg and Richmond?

Mr. *Triplett.* Yes, ſir.

Preſident. Had you any converſation with judge Chaſe previous to this interview?

Mr. *Triplett.* No, ſir.

Preſident. Did you ſit together in the ſtage?

Mr. *Triplett.* We did the ſecond day, and it was then the converſation paſſed.

Mr. *Hopkinſon.* When was it, that for the firſt time, you mentioned this converſation to any body?

Mr. *Triplett.* I do not recollect when I mentioned it the firſt time; but I remember to have communicated it to general Maſon on my return to Dumfries.

Mr. *Nicholſon.* Have you ſince mentioned it to others?

Mr. *Triplett.* Frequently.

On the ſuggeſtion of Mr. Randolph, that Mr. Triplett had fractured his wriſt, from which he apprehended ſerious conſequences, he was diſmiſſed with the conſent of the counſel for the reſpondent, from further attendance on the court.

At the inſtance of Mr. Lee, JOHN HEATH, examined yeſterday, was again called in.

Mr. *Lee.* You mentioned yeſterday that you made two applications for an injunction. Were they made at the judge's chambers, or in court?

Mr. *Heath.* I mentioned that I made the application to the court, and that it was not then granted. I then ſtated that

I went to the judge's chambers the next day before the court met.

Mr. *Lee.* Who compoſed the court when the injunction was moved in the firſt inſtance?

Mr. *Heath.* I think, but I cannot be particular, that judge Griffin was there. He was, however, there the next day.

Mr. *Lee.* At what time of the day was it that you went to the judge's chambers reſpecting your application for the injunction?

Mr. *Heath.* It was immediately after breakfaſt. We generally breakfaſted early. Immediately after I waited upon him. I think it was between 8 and 9 o'clock.

Mr. *Lee.* What ſpace of time were you there?

Mr. *Heath.* I do not think I was there quite half an hour.

Mr. *Lee.* Was the bill read by yourſelf, or put into the hands of the judge to read it, at the time you made the application at his chambers?

Mr. *Heath.* I do not recollect to have preſented the bill to the judge. I am not poſitive that I had the bill with me. I called upon him for the purpoſe of learning the reaſons, why he did not grant the application. [Here the witneſs related ſome remarks of judge Chaſe on the application for an injunction, which were too indiſtinctly heard to be reported.]

Mr. *Lee.* Who were preſent at the judge's chambers at the time you ſtate the converſation took place between judge Chaſe and Mr. David M. Randolph reſpecting the pannel of the jury?

Mr. *Heath.* No other perſon was preſent but myſelf. When I came in I found the judge alone, and I thought myſelf fortunate in ſo finding him. We had been in converſation by ourſelves for 8 or 10 minutes before Mr. Randolph came in.

Mr. *Lee.* Was any perſon preſent at the door, or was the door open at the time?

Mr. *Heath.* I do not recollect that there was; but it appeared to me that as I was going into the houſe, ſomebody was coming out; and I found the judge alone, I am poſitive when I entered; and we continued alone until Mr. Randolph ſtepped in. It ſtruck me there might have been ſomebody that came in at the main door of the houſe between the time I was there and Mr. Randolph's coming in; but I am not certain.

Mr. *Lee.* You ſay ſomebody was coming out, when you went into the room. Was it Mr. Randolph?

Mr. *Heath.* No, ſir, I ſaid there might be ſomebody coming out, but whether out of his chamber, or out of another room, I am not certain; but when I entered his chamber I found him alone, and I thought myſelf fortunate in ſo finding him.

Mr. *Lee.* On what day of the week was this?

Mr. *Heath.* I do not recollect.

Mr. *Lee.* How many days was it after your motion to the court before you went to the judge's chambers?

Mr. *Heath.* I do not recollect; but I think it was a few days after the bill againſt Callender had been found, and he had been arreſted; but as to days, hours and minutes, I do not pretend to recollect them.

Mr. *Lee.* Am I to underſtand that it was after Callender appeared in court?

Mr. *Heath.* I do not ſay ſo. It was after Callender was brought forward by the marſhal, and a true bill found. I think it was immediately after; but I do not recollect whether a day or two after.

Mr. *Lee.* Did you go to judge Chaſe's chambers on any buſineſs more than that one time?

Mr. *Heath.* No—I never did more than that one time.

Mr. *Chaſe.* It was with the motion.

Mr. *Heath.* Yes, ſir, it was with the motion.

Mr. *Randolph.* Did you at any, and at what time, mention this circumſtance, and to whom did you mention it?

Mr. *Heath.* As ſoon as it happened, I conſidered the converſation improper, and I thought I had a right to relate it, as I did not viſit Mr. Chaſe as a friend, but as a judge in his judicial character to perform the duties of his office, and on buſineſs which might have been done in open court as well as at his chambers. I mentioned it to Mr. Hugh Holmes, alſo to Mr. Meriwether Jones.

Mr. *Randolph.* Do you mean Mr. Holmes, the preſent ſpeaker of the Houſe of Delegates of Virginia?

Mr. *Heath.* Yes, ſir.

Mr. *Randolph.* You ſtate that you mentioned it to Mr. Holmes and Mr. Jones—did you mention it to any body elſe?

Mr. *Heath.* I was ſo much impreſſed with it, that I mentioned it to ſeveral others.

Mr. *Nicholſon.* Did you ſay that you made this communication to thoſe gentlemen immediately after the converſation occurred?

Mr. *Heath.* On the very day, and within an hour afterwards; and I have ſince mentioned it frequently to others—I never kept it a ſecret.

Mr. *Hopkinſon.* Was this converſation on the day of the trial of Callender, or how many days before?

Mr. *Heath.* I do not recollect whether Callender was tried that day; I mentioned yeſterday that I did not attend the trial.

Queſtion. Did you make your motion at the ſame term that Callender was tried?

Mr. *Heath.* Yes, ſir—There were intervals in which motions were made by counſel. During one of theſe intervals I made my motion for an injunction. Callender had not then been tried; I do not know that when I made the motion the marſhal had returned with Callender, but I made it the day before I went to the judge's chambers.

Mr. *Nicholſon.* Was the converſation before the impannelling of the jury in the caſe of Callender?

Mr. *Heath.* Yes, ſir—The marſhal came in during the time I was in converſation with the judge, it appeared to me, to ſhew the judge what kind of a pannel he had.

At the requeſt of Mr. Harper, and with the conſent of the managers, JOHN BASSET, a witneſs on the part of judge Chaſe, was ſworn and examined, in conſequence of the peculiar ſituation of his family requiring his immediate return home.

Mr. *Harper.* Relate the circumſtances that took place relative to your being ſworn on the jury, on the trial of Callender, and what the application to the court was on your behalf?

Mr. *Baſſet.* The circuit court of the United States at which James T. Callender was preſented and indicted for a libel, was held on Monday the 2d or 3d of June. I left home in the morning and arrived in Richmond as early as might be expected. On my arrival I ſaw David M. Randolph, who was ſtanding at a corner of a ſtreet; perceiving me, he came towards me; before I alighted from my horſe, he informed me that I had been ſummoned as a grand juror, and that for not appearing, had been croſſed, that it was my duty to go to the

court and juſtify myſelf for my abſence; that he ſummoned me on the petit jury for the trial of Callender, and that my ſerving in that capacity would be an apology for my previous abſence. I preſented myſelf to the court, but the trial did not come on that day. The ſecond day I attended alſo. I knew very well that the law under which the traverſer was to be tried, was odious to my fellow citizens; I knew it was conceived to be a great oppreſſion to the liberty of the ſubject, and I believed that great umbrage would be given to the maſs of the people by thoſe who ſhould undertake to execute that law. I was weak or wicked enough to be among that claſs of people called federaliſts, and I did believe that the law [ſedition law] was conſtitutional. I felt myſelf bound when called on to be a jury man, to make a declaration of my political ſentiments. I made this delaration to relieve the impreſſion on my own mind, and not in order that it ſhould be conſidered that I declined, in conſequence of my political opinions, to ſerve on Callender's trial, or in any other caſe. I thought it poſſible that I might be excuſed; but if I were found by the court to ſtand in a proper relation between my country and the traverſer, I would cheerfully ſerve. My object was to juſtify my own conduct to myſelf, and to the whole world. I made uſe of theſe expreſſions, and I believe I repeat the very words, but I am well aſſured that I ſhall expreſs the force and efficacy of what I ſaid. I declared to the judge that my politics were federal; that I had never ſeen the book called the Proſpect Before Us, but I had ſeen in a newſpaper ſome extracts from it; that if the extracts were correctly taken from the book, and if the traverſer was the author or publiſher of that work, it appeared to me that it was a ſeditious act, that I had formed and expreſſed an unequivocal opinion, that the book was a ſeditious act, that I had never formed an opinion in reſpect to the indictment, for I had neither ſeen it nor heard it read. The court conſidered me a good juror, and I was ſworn accordingly. After the trial had been gone through, the jury retired to their room. I informed the jury that I thought we ſhould have the book read through.

The *Preſident* here ſtopped the witneſs, and informed him that it was a uſeleſs waſte of time to relate what took place in the room of the jury.

The witneſs, however, continuing the ſtatement he had previouſly begun, the *Preſident* deſired him to go on, if it were

neceſſary for the purpoſe of connecting the teſtimony he had to give; but to paſs over what occurred among the jury as briefly as poſſible.

Mr. *Baſſet.* I told the jury that I thought the book ſhould be read. The jury did not at firſt agree, but the greater part of it was afterwards read. In reſpect to the general progreſs, I will ſtate one point that makes a great impreſſion on my mind; I do not pretend, however, to a ſuperior recollection, eſpecially after a lapſe of five years, during which I never dreamt it would be the ſubject of diſcuſſion; but I will give my impreſſions. The judge, addreſſing the counſel for the traverſer ſaid, when my country inveſted me with my ſacred office, it placed me under an obligation to adminiſter juſtice according to law; this I am determined to do, and I have done it. I have decided what the law is, but this deciſion is not concluſive againſt the traverſer. If any exceptions are made by his counſel to my deciſion, they may be reduced to writing, and if I have committed errors, a ſuperior tribunal ſhall correct them.

Mr. *Randolph.* You ſtated that you had read extracts from the Proſpect Before Us in newſpapers, before you were impannelled on the jury, which impreſſed you with the opinion that it was a ſeditious publication. After reading over the book, did it appear to you to anſwer that deſcription?

Mr. *Baſſet.* I thought it was more libellous than the extracts I had ſeen.

Mr. *Randolph.* The extracts and the book did not then correſpond.

Mr. *Baſſet.* I cannot ſay. I could not ſay the extracts were the ſame with what I read in the book; I only recollect that my impreſſion was that they were the ſame. I could not then, nor can I now ſay they were conformable to the book, but my impreſſion is, that they were the ſame in ſubſtance.

Mr. *Harper.* Did you mean to ſay that the contents of the book were more libellous than the extracts?

Mr. *Baſſet.* I meant to ſay, that after I had read the book, my impreſſions were that it was more libellous than I conceived it to be when I read the extracts.

Mr. *Nicholſon.* Do you recollect at what time you arrived in town?

Mr. *Baſſet.* I cannot recollect, but I believe ſoon after the court met: that morning I roſe early and rode 22 miles, about four hours riding.

Mr. *Nicholſon.* Was the book given by the court to the jury?

Mr. *Baſſet.* I underſtood that it was delivered by the court to the jury for their inſpection, and to compare the extracts from the book, and ſee whether they were correctly taken, but I do not recollect that the judge particularly called our attention to the book, and directed us what was to be done with it; but my recollection is that the book was delivered to us.

Mr. *Rodney.* Was the indictment read after all the jury were ſworn?

Mr. *Baſſet.* I do not recollect that the indictment was read till after the jury was ſworn.

Mr. *Rodney.* Had the book given to the jury any paſſages ſcored?

Mr. *Baſſet.* I think it had.

Mr. *Rodney.* Do you know whether the paſſages marked formed any part of the indictment?

Mr. *Baſſet.* I cannot ſay that I recollect.

Mr. *Campbell.* When you were ſworn did you underſtand that the charges in the indictment were taken from the book called the Proſpect Before Us?

Mr. *Baſſet.* It was a ſubject of general notoriety, that the indictment was drawn from the Proſpect Before Us.

Mr. *Campbell.* What authority had you for ſuppoſing that the extracts you had read were taken from the Proſpect Before Us?

Mr. *Baſſet.* I had no authority but the newſpapers, they purported that the extracts were taken from the book called the Proſpect Before Us.

Mr. *Randolph.* Have you any reaſon to believe that the extracts in the newſpapers were not taken from the book?

Mr. *Baſſet.* I firmly believe they were taken from it.

Mr. *Hopkinſon.* Was the book which you took out that which was given in evidence during the trial?

Mr. *Baſſet.* Whether it was the book which was furniſhed by the proſecutor and handed to us by the agent of the court, I cannot tell.

Mr. *Hopkinſon.* At what hour did the court meet?

Mr. *Baſſet.* I believe about 10 o'clock.

The *Preſident.* I underſtand you as ſaying that you never ſaw the book, until you ſaw it in court?

Mr. *Baſſet.* I am firmly and fully ſo impreſſed.

The *Preſident.* When you were queſtioned as a juror, I underſtand you to have ſaid, that if the extracts you had read were correctly given, the matter was libellous; did you ſay that you had formed an opinion?

Mr. *Baſſet.* No, ſir, nor that I had delivered an opinion, but I ſaid that if the traverſer was the author of thoſe extracts, he was guilty of a breach of the ſedition law. I repeat every expreſſion that is now remaining on my memory. I anſwered ſo far as to the fact. The enquiries extended no farther than to making up my opinion on the extracts contained in the newſpapers. It had no connection whatever with the book. I do not know that I ſtated to the court that I had expreſſed an opinion.

Mr. *Harper.* Did you make an application to the court to be excuſed, or did your obſervations ariſe from motives of delicacy?

Mr. *Baſſet.* If my memory does not fail me I did not ſolicit the judge to excuſe me; the office of a juryman is no doubt always an unpleaſant one, but when I am called upon to perform a duty, I do not ſhrink from the taſk. I had ſome doubts whether my mind was in a proper ſtate to paſs between my country and the traverſer. It was to remove theſe doubts that I made the declaration and for no other purpoſe.

Mr. *Lee.* On what day of the week was Callender tried?

Mr. *Baſſet.* I arrived about 10 o'clock on Monday, and the next day the jury were ſworn at the uſual time.

Mr. *Bayard.* What was the general deportment of the judge to the counſel, and of the counſel to the court?

Mr. *Baſſet.* The different coloring through which the ſame things are ſeen make ſome men ſee things differently from others. My own opinion is that the judge conducted himſelf with deciſion unmixed with ſeverity, and that he was witty without being ſarcaſtic. It was my impreſſion that the judge wiſhed the priſoner to have a full hearing, that he might be acquitted, if innocent, and found guilty, if really guilty. It appeared to me that the ſole point on which the counſel hoped to ſave their client was by proving the unconſtitutionality of the ſedition law, and it appeared to me that

they could not form a reaſonable expectation of acquitting him on any other ground. I believe his counſel believed the law unconſtitutional, and thought they had eloquence and argument enough to convince the jury of it. I believe they thought the judge deprived them of their right to addreſs the jury on that point; and that having the cauſe very much at heart, they were vaſtly mortified that the court did not permit them to take the courſe they wiſhed. They appeared to conſider themſelves as advocating the cauſe of an oppreſſed citizen, and they felt hurt at not being allowed the mode of defence which in their opinion the law authoriſed. In all their arguments they travelled but little way before they came to the point that went to prove the law unconſtitutional, and the judge declared, at every ſuch time, that they had no right to addreſs the jury on that point; that the conſtitution had made the court the ſole judges of the law as far as it reſpected its conſtitutionality. From theſe circumſtances, it is my impreſſion that the altercation between the bar and the court aroſe ſolely from the ſenſibility of the counſel to this particular ſubject, and from being deprived, as they ſuppoſed, of their rights.

The *Preſident.* What were the particular cauſes of irritation between the judge and the counſel?

Mr. *Baſſet.* I have ſtated what I conſidered the cauſes. They aroſe from the counſel adverting to that particular point, and their ſo frequently doing it occaſioned the judge to elevate his voice, and to pronounce over and over again what he conceived to be the law.

Mr. *Rodney.* Was the queſtion put by the court, whether you had formed and delivered an opinion on the charges contained in the indictment?

Mr. *Baſſet.* My memory on the particular form of the queſtion is imperfect, but I will ſtate my idea of it. I at firſt thought the queſtion had been put in the disjunctive, *or*—but I am now perſuaded that I was miſtaken, ſo many gentlemen concurring in recollecting that the word *and* was uſed, I muſt believe I was miſtaken.

Mr. *Rodney.* When the queſtion was put, did you not ſay that you had formed an opinion on the extracts, and did you not expreſs the very opinion which you had formed?

Mr. *Baſſet.* I did, and I ſaid that if the book anſwered to the extracts, I had formed an unequivocal opinion that it was libellous.

Mr. *Rodney*. And this before you was ſworn?

Mr. *Baſſet*. Yes, ſir.

The witneſs was then, from the peculiar circumſtances already ſtated, excuſed with the conſent of the parties from any further attendance on the court; the *Preſident* obſerving that although the indulgence was granted in this inſtance, he hoped it would not be made a precedent for a general practice.

The court roſe at 4 o'clock.

THURSDAY, *February* 14, 1805.

The court was opened at 12 o'clock.

Present, the Managers, attended by the House of Representatives in committee of the whole: and Judge Chase, attended by his counsel.

On the requeſt of Mr. Harper, and with the conſent of the managers, EDMUND RANDOLPH, a witneſs on behalf of the reſpondent, was *ſworn*.

Mr. *Hopkinſon*. Were you preſent at the trial of Callender?

Mr. *Randolph*. I was preſent during a ſhort part of the time.

Mr. *Harper*. What was the general conduct and demeanor of the court towards the counſel. Was it harſh, rough, and irritating; or was it mild and facetious?

Mr. *J. Randolph*. I wiſh to ſubmit to the court, whether it is proper to put this queſtion in the form propoſed. I wiſh the witneſs may, in ſtating the conduct of the court, confine himſelf to ſpecific facts, as much as poſſible.

Mr. *Harper*. The general conduct of the court is a matter of fact, and the particular acts of the court go to ſhew what that was.

The *Preſident* here deſired the anſwer to be reduced to writing, when Mr. Harper ſaid that he had no objection to withdrawing the queſtion—Mr. J. Randolph, however, waving any objection to it, the Preſident deſired Mr. Randolph to proceed.

Mr. *Randolph*. The anſwer I have to make is very ſhort. Having been abſent the greater part of the time, I do not conſider myſelf competent to ſay what the general conduct of the

court was. I recollect that ſhortly after the trial commenced, I came into court, and ſat very near the bench on which the judges ſat. I continued there ſome time, while a portion of the very lengthy indictment was reading. I then went out, and returned to my own houſe, where I continued until the time when I ſuppoſed the reading of the indictment would be finiſhed. Juſt on my entrance into the lobby of the court, I ſaw the counſel for the traverſer folding up their papers, and retiring from the bar.

Mr. *Harper.* Were you in court during the time when the previous motions were made?

Mr. *Randolph.* Shortly after the indictment was found againſt Callender, I was in court. The only incident which I recollect to have taken place at that time, was ſeeing the clerk or the attorney of the diſtrict hand up to judge Chaſe a paper, about which I made enquiry of ſomebody near me, and learnt that it was a warrant for proceſs for apprehending Callender. This is all I recollect previous to the arreſt of Callender. When Callender was brought into the court, I ſtood outſide of the croud, at ſome diſtance from the court. I heard a great deal ſaid, but I do not recollect what I did hear. I am therefore ſatisfied that I am incapable of giving a connected ſtatement of what paſſed at that time. On the ſucceeding day the trial commenced; but I was not preſent when the motion was made for a continuance. I have ſtated already how far I was a witneſs from that time to the concluſion of the trial.*

Mr. *Harper.* What was the demeanor of the court when you ſaw the counſel folding up their papers?

Mr. *Randolph.* I do not recollect any ſpecific facts.

Mr. *Harper.* What was their general demeanor during the trial?

Mr. *Randolph.* From the cauſes I have ſtated, I am not able to anſwer this queſtion.

Mr. *Harper.* Have you no general impreſſion?

Mr. *Randolph.* I cannot ſay I have.

Mr. *Harper.* Was there any thing which ſtruck you as remarkable, improper, or otherwiſe?

* The introduction of Mr. Randolph's teſtimony was delivered in ſo low a voice as not be heard by the reporter. But it is underſtood that, in the part not heard, nothing relevant to the charges in the articles of impeachment, was ſaid.

Mr. *Randolph.* I have no heſitation in ſaying that I ſaw nothing that conveyed the idea of corruption.

Mr. *Harper.* What do you mean by corruption?

Mr. *Randolph.* I mean an evil intention to oppreſs the traverſer. I ſpeak only of thoſe parts of the trial which I witneſſed myſelf, and I muſt be underſtood as knowing little of what paſſed from my own obſervation.

Mr. *Harper.* You ſay you perceived no evil intent to oppreſs the traverſer?

Mr. *Randolph.* I had no idea of the ſort.

Mr. *Lee.* Do you recollect nothing that was ſaid by the court to the counſel, when they were putting up their papers and retiring?

Mr. *Randolph.* No, ſir, I was at a conſiderable diſtance, at the door of the lobby at the time. I have no further anſwers to make to the queſtions propoſed; I do not think it incumbent on me to relate matters that are irrelevant, or to go into conjectures.

Mr. *Harper.* We are ready to hear any thing from a gentleman ſo well ſkilled——

Mr. *Randolph.* The reaſon of my remark is my having underſtood that I was ſummoned in relation to opinions delivered by me at the time of the trial.

Mr. *Harper.* We are ſenſible that we cannot require them.

Mr. Randolph was, by conſent of both parties, excuſed from further attendance as a witneſs.

GEORGE READ *ſworn.*

Mr. *Randolph.* The witneſs will pleaſe to ſtate what he knows in relation to certain proceedings at a circuit court of the United States, held at New Caſtle, in the ſtate of Delaware, in the month of June, 1800.

Mr. *Read.* It is incumbent on me to ſtate that ſeveral years have elapſed ſince the tranſactions, which I am now about to relate, occurred; of courſe I cannot pretend to ſay that the language I ſhall uſe to convey the ſentiments delivered by Mr. Chaſe is preciſely according to what occurred at the time; but the ſubſtance of what I relate will be correct. The tranſactions, to which I preſume I am called to teſtify, took place at a ſeſſion of the circuit court, held in New Caſtle, for Delaware diſtrict, in June, 1800. The court ſat two days, viz.

on the 27th and 28th days of the month. At that court, Samuel Chaſe, one of the aſſociate juſtices, preſided, and Gunning Bedford, diſtrict judge, was aſſociated with him. Judge Chaſe, as uſual, delivered a charge to the grand jury, on the firſt day of the term. The grand jury, after hearing the charge, retired to their chamber; after remaining there for ſome time, they returned into court, and on being aſked whether they had found any bills, or had any preſentments to make, they anſwered, they had found no bills of indictment, and had no preſentments to make. After receiving this anſwer, judge Chaſe proceeded to obſerve, as nearly as I can recollect, addreſſing himſelf to the grand jury, that he had been informed, or heard, that a highly ſeditious temper had manifeſted itſelf in the ſtate of Delaware, among a certain claſs of people, eſpecially in New Caſtle county, and more eſpecially in the town of Wilmington, where lived a moſt ſeditious printer, unreſtrained by any principle of virtue, and regardleſs of ſocial order; that the name of this printer was ——, the judge here pauſed, and ſaid, perhaps it might be aſſuming, or taking upon himſelf too much to mention the name of this perſon; but, gentlemen, it becomes your ſpecial duty, and you muſt enquire diligently into this matter. Several of the jurors, I believe, made a requeſt to the court to diſmiſs them, and aſſigned as the reaſons for their requeſt, that ſome of them were farmers, and as it was about the time of harveſt, they were anxious to be on their farms. The judge obſerved that the buſineſs to which he had called their attention was of a very urgent and preſſing nature, and muſt be attended to; that he could not, therefore, diſcharge them before the next day, when further information ſhould be communicated to them on the ſubject he had referred to. The judge then addreſſing himſelf to me as diſtrict attorney, aſked me, as I believe is uſual on ſuch occaſions, whether I had any criminal charges to ſubmit to the grand jury. I ſaid that none ſuch had yet occurred, and I believed none were likely to occur during that term. Judge Chaſe continuing his addreſs to me, obſerved, you might, by proſecuting proper reſearches, make ſome diſcoveries. Have you not heard of ſome perſons in this ſtate, who have been guilty of libelling the government, or the adminiſtration of the government of the United States. I am told, and the general circulation of the report induces me to believe it, that there is a certain printer in the town of Wilmington, who

publiſhes a moſt ſcandalous newſpaper; but it will not do to mention names. Have you not two printers in that town? I anſwered that I believed there were. Judge Chaſe obſerved that one of them was a ſeditious printer, adding, he ſhall be taken notice of, and it is your duty, Mr. attorney, to examine unremittingly and minutely into affairs of that nature; times like theſe require that this ſeditious temper or ſpirit which pervades too many of our preſſes ſhould be diſcouraged or repreſſed. Can you not find a file of theſe newſpapers between this time and to-morrow morning, and examine them, and diſcover whether this printer is not guilty of libelling the government of the United States? This I ſay, ſir, muſt be done; I think it is your duty. I obſerved, as this ſubject was preſſed by the honorable judge, I believed I was acquainted with the duties of my office, and was willing to diſcharge them. I mentioned that I had not in my poſſeſſion the papers alluded to by the judge, nor had read them. But that if a file of them were procured and handed to me, I had no objection to examine them, and communicate with the grand jury on the ſubject. The judge then ſaid he was ſatisfied, and turning to the grand jury, obſerved, that he could not diſcharge them, however inconvenient their ſtay; they muſt attend the enſuing day, at the uſual hour. The judge then directed that a file of the papers ſhould be procured for me; I underſtood him to mean the paper called the Mirror of the Times, and General Advertiſer, though I do not recollect to have heard the title of the paper mentioned during the proceedings. A file of thoſe papers was brought to me in the afternoon, after the adjournment of the court; by whom they were brought I do not recollect. I examined them, but in a curſory manner, as I was very much interrupted by perſons calling upon me. I did not diſcover during the courſe of this examination, any libellous matter coming within the proviſions of the ſedition act. According to what I underſtood to be the wiſh of the judge, I ſent this file of papers to the grand jury. Soon after the meeting of the court on the ſecond day, and at the requeſt of the grand jury, I attended them in their room. On entering, the foreman of the jury addreſſed me, and directed my attention to a paragraph in a publication contained in the Mirror of the 21ſt June, 1800, republiſhed from the Aurora, reflecting, perhaps in ſtrong and pointed language, on the former conduct of judge Chaſe.

He obſerved that there was a difference of opinion among the jurors as to the nature of the paragraph—ſome doubted whether it was a libel or not, and if libellous, whether they had a right to preſent it to the circuit court. I obſerved that it was not neceſſary for me to be very particular in my opinion of the publication, as I did not conſider it as coming under the ſedition law, though it might be conſidered as an offence at common law, becauſe judge Chaſe had decided that the circuit court could not take cognizance of caſes ariſing at common law. I returned into court; after ſome time the file was placed before the judge. Judge Chaſe aſked me what had been done, and whether the grand jury had made any diſcoveries of libellous matter. I anſwered none, unleſs it were the paragraph which related to judge Chaſe, which I ſhewed him, obſerving that it did not appear to me to come under the ſedition law. Judge Chaſe acquieſced; and the buſineſs was paſſed over on his part in a very polite and affable manner. I do not recollect any thing further to have paſſed. I have, however, an indiſtinct recollection of a converſation between judge Chaſe and myſelf, in the room of a tavern, before we went into court; in which I underſtood him to have made a general declaration of hoſtility againſt ſeditious printers.

Mr. *Randolph.* You ſaid the judge gave orders to ſomebody to procure a file of newſpapers. Do you recollect to whom he addreſſed himſelf?

Mr. *Read.* I do not; but I underſtood to the bailiff or marſhal, or ſome other officer.

JAMES LEA *affirmed.*

Mr. *Rodney.* Pleaſe to relate to the court, the occurrences which took place at a circuit court of the United States at New Caſtle, and whether you were ſummoned as a grand juror at that court.

Mr. *Lea.* I was ſummoned by the marſhal of the diſtrict of Delaware, as a grand juror at the circuit court held in the month of June, 1800. I attended agreeably to that ſummons and was qualified as a grand juror. After receiving a charge from judge Chaſe we retired to our room, and remained there for ſome time. There appearing to be no buſineſs for us, we returned into our box. The uſual queſtion was put to us whe-

ther we had found any bills. We ſaid that we had not. After ſome time judge Chaſe addreſſed the grand jury, and obſerved that a very ſeditious diſpoſition had manifeſted itſelf in the ſtate of Delaware; in the county of New Caſtle, and particularly in the town of Wilmington: that a ſeditious printer lived in that place, who edited a paper called the Mirror of the Times, and the General Advertiſer, who was in the habit of libelling the government of the United States, and that his name was———he ſaid he would not mention his name; but that it was our duty to enquire if any ſeditious publications had been made; that he would not diſcharge us that day, nor until we had made the enquiry. Several of the jurors addreſſed the judge for leave to return home, ſtating that they were farmers, and were extremely anxious to be on their farms as it was harveſt time. Some converſation paſſed between judge Chaſe and the attorney of the diſtrict, after which he ſaid he could not diſcharge us until the next day. We returned the next day into court, and after ſitting ſome time in our box we retired to the jury room. A file of newſpapers was produced by ſome perſons, and we examined them. We found nothing in them of a libellous nature in our opinion, excepting ſomething relative to judge Chaſe; which ſome of the jury thought came under the ſedition law. We ſent for the attorney of the diſtrict, to inform us, as to the nature of that paragraph. He told us it did not come under the ſedition law. We went into the jury box; when a converſation of ſome length took place between judge Chaſe and the attorney of the diſtrict, after which we were diſcharged.

Mr. *Martin.* What time did you come down on the firſt day?

Mr. *Lea.* We were up a very ſhort time; perhaps an hour.

Mr. *Martin.* What time the ſecond day?

Mr. *Lea.* A good while.

Mr. *Martin.* What time is the harveſt in Delaware?

Mr. *Lea.* It was the time of hay harveſt.

Mr. *Randolph.* I will aſk you, whether you recollect the judge to have quoted the title of the paper?

Mr. *Lea.* I recollect that he did.

Mr. *Randolph.* Was it the ſame paper that was ſent you by the attorney?

Mr. *Lea.* It was.

JOHN CROW *ſworn.*

Mr. *Rodney.* Pleaſe to ſtate what occurred in the circuit court held at New Caſtle.

Mr. *Crow.* I was not in the court houſe the firſt day. On the ſecond day, I went into court juſt after it was opened. I recollect there was ſome converſation that took place between judge Chaſe and the diſtrict attorney. The judge aſked the attorney of the diſtrict if there were any preſentments likely to be made that day. The attorney anſwered, there were none; that on examining the file of newſpapers, there was nothing found libellous, unleſs it were ſome ſtrictures on the judge himſelf. If that is all, the judge replied, we will take no notice of it. I recollect nothing further. The judge ſhortly after diſcharged the grand jury.

JOHN MONTGOMERY *ſworn.*

Mr. *Randolph.* The ſubject on which it is underſtood you are capable of giving ſome information to the court, is the conduct of judge Chaſe at a circuit court of the United States held for the diſtrict of Maryland, at Baltimore, in May 1803, or about that time.

Mr. *Montgomery.* The point I preſume, on which I am called to give teſtimony, relates to a charge to a grand jury delivered by judge Chaſe, at a circuit court where he preſided, and judge Wincheſter was aſſociated with him. It will not, from the nature of the ſubject, be expected that I ſhall be able to detail in the preciſe language of the judge, the whole of the charge which was delivered in 1803, at the May term. Though not one of the bar, I was preſent at the court, and took a chair among the gentlemen of the bar. After the grand jury were impannelled, judge Chaſe addreſſed them. He appeared to addreſs them from a written paper that lay before him. He proceeded in the uſual manner to charge the jury as to the duties expected to be performed by them. After he had thus far proceeded in his charge, he mentioned that before the jury retired to their chamber, he would make ſome obſervations, and that they would be conſidered as flowing from a wiſh for the happineſs or welfare of the community. He ſtated that it was important that the people ſhould be fully informed, particularly at ſuch a criſis; that falſehood was

more eafily diffeminated than truth; and that the latter was reluctantly attended to, when oppoſed to popular prejudice. I cannot pretend to ſtate the ſentiments delivered by the judge in the order in which they were delivered. I can undertake to ſtate from my recollection, the ſubſtance of thoſe he delivered. To the beſt of my recollection the judge ſtated that the adminiſtration was weak, relaxed, and inadequate to the duties devolved on it, and that its acts proceeded not from a view to promote the general happineſs, but from a deſire for the continuance of unfairly acquired power. The language unfairly acquired power, made a ſtrong impreſſion on my mind at the time, and when the judge called the attention of the jury to the obſervations he was about to make, I was prepared to expect ſomething extraordinary from him, as I was at Annapolis, when he pronounced the valedictory addreſs, which Mr. Maſon in his teſtimony took occaſion to mention. The judge ſtated the violation of the conſtitution that had taken place by the act of Congreſs repealing the judiciary act of 1800, and the conſequent removal of ſixteen judges; that it had made a violent attack on the independency of the judiciary. He alſo found fault with a law paſſed by the legiſlature of Maryland in 1801, the effect of which was the removal of all the judges on the county court eſtabliſhment; he ſtated that thoſe acts were a ſevere blow againſt the independence of the judiciary; he ſtated that ſince the year 1776, he had been an advocate for a repreſentative or republican form of government; that it was his wiſh that freemen ſhould be governed by repreſentatives choſen by that claſs of citizens who had a property in, a common intereſt with, and an attachment to the community; the language might have been in the words of our conſtitution; he found fault with the law paſſed by the legiſlature of Maryland, which he ſtiled the univerſal ſuffrage law. He ſtated, that that alſo affected the independence of the judiciary, and to the beſt of my recollection, he explained his ideas in this manner. That every free white male citizen, in the language of the conſtitution, having the qualification of age and reſidence, though he had not a property in, an intereſt with, and an attachment to the community, being ſuffered to chooſe thoſe who conſtituted the legiſlature, and the judiciary being dependent on the legiſlature for their ſupport and continuance in office, few characters of integrity and ability, who are com-

petent to diſcharge the duties of judges, would be found to accept of appointments held on ſuch a tenure. He ſtated that theſe meaſures were deſtructive of the happineſs and welfare of the community; that they would have a tendency to ſink our republican government into what he called a mobocracy, the worſt of all poſſible governments. When on the ſubject of the alteration of the ſtate conſtitution, he ſtated that the framers of that conſtitution were men of ability and patriotiſm; the names of ſome of whom were honorably enrolled on the journals of Congreſs, and alſo, I think he ſaid on the journals of the convention of Maryland; that he had to obſerve, that the ſons of ſome of thoſe characters, which he regretted, were the chief ſupporters of theſe deſtructive meaſures. He ſtated that where there were equal laws and equal rights, viz. laws equally adminiſtered, between the rich and the poor, in that country there was freedom. But where the adminiſtration of the laws was partial and uncertain, the people were not free, and he was apprehenſive we were faſt approaching to that ſtate of things. He ſtated that there was but one act remaining to be done, mentioning the act paſſed by the legiſlature of Maryland, for the trial of facts and for aboliſhing the general and appellate court; if that ſhould be adopted, the conſtitution would not be worthy of further care or preſervation. At the cloſe of the judge's charge, he, in an impreſſive manner, called on the jury to pauſe, to reflect, and when they returned to their homes, to uſe their endeavors to prevent theſe impending evils, and ſave their country. He ſaid that the people had been miſled by miſrepreſentation, falſehood, art and cunning; that by correcting theſe errors, the threatened evils might be prevented, or words to that effect. With regard to a part of the anſwer of judge Chaſe which has been publiſhed, and which I have read, perhaps it will not be improper for, and may be expected of me, to mention a fact contradictory to what is ſtated therein. It is ſtated in the anſwer, "The next opinion is, that "the independence of the judges of the ſtate of Maryland, would be entirely deſtroyed if the bill for aboliſhing the two ſupreme courts ſhould be ratified by the next general aſſembly." This opinion, however incorrect it may be, ſeems to have been adopted by the people of Maryland, to whom this argument againſt the bill in queſtion was addreſſed: for at the next ſeſſion of the legiſlature this bill, which went to change entirely

the conſtitutional tenure of judicial office in the ſtate, and to render the ſubſiſtence of the judges dependent on the legiſlature, and their continuance in office on the executive, was abandoned by common conſent."

It is true it was abandoned by common conſent, but not for the reaſons aſſigned by the judge in this part of his anſwer.

Mr. *Nicholſon.* Was the proviſion for eſtabliſhing univerſal ſuffrage a part of the conſtitution, at the time judge Chaſe delivered the charge?

Mr. *Montgomery.* It was.

Mr. *Randolph.* You ſtate that the charge appeared to have been delivered from a written paper which lay before the judge. Do you mean to be underſtood, that after going through the firſt part of the charge on the ordinary duties of a grand jury, the latter part appeared to be delivered from a written paper?

Mr. *Montgomery.* It appeared to me that the latter, as well as the former part, was delivered in the ſame manner; the judge keeping his eyes on the paper before him.

Mr. *Nicholſon.* Do you recollect whether the very laſt part of the charge, when he deſired the jury to pauſe and reflect, &c. was delivered from the written paper?

Mr. *Montgomery.* It appeared to me as if he confined himſelf throughout to the written paper.

JOHN T. MASON was again called.

Mr. *Randolph.* You will pleaſe to mention ſuch circumſtances, as came under your obſervation, at a circuit court of the United States held at Baltimore in May 1803, in relation to a charge delivered to a grand jury.

Mr. *Maſon.* I was preſent when ſuch a charge was delivered; I was preſent when it commenced and continued in court until it ended. I have, however, a very imperfect recollection of the greater part of it, and of a great part of it, perhaps, I have no recollection at all. I had not been in Baltimore for two years previous; the court room was very full; and while I was there a number of perſons came up to ſalute me. I felt no particular intereſt in it, and I only attended to thoſe parts of the charge, during the delivery of which I was not interrupted by interchanging the civilities of my friends and acquaintance. I do not think I can charge my recollection with more than three great points in the charge; nor am

I certain that I can give them in the order in which the judge delivered them. The firſt contained pretty ſtrong and cenſuring animadverſions on the act of Congreſs which repealed the law paſſed in February 1801, for the new organization of the courts of the United States, by which the ſixteen new judges of the circuit court were removed from office. He ſpoke of it as an event which had wounded the independence of the judiciary, and as calculated to produce great miſchief. I do not however pretend to give the words, but only to embrace the idea.

With regard to the ſecond point which I recollect, it will perhaps be neceſſary for me to explain that according to the proviſion in the conſtitution of Maryland, for altering that inſtrument, amendments may be made by a legiſlative act paſſed by two ſucceſſive legiſlatures. Under the conſtitution, before a late amendment was made, no man was permitted to vote unleſs poſſeſſed of property to the value of thirty pounds. That part of the conſtitution had been altered by two ſucceſſive legiſlatures by confining the qualifications of voters, to age, reſidence, and color. This amendment Mr. Chaſe ſpoke of as one calculated to ſap the foundations of our government, as injurious, and as leading to a great many evils.

The third ground aroſe on this circumſtance. An effort had been made to alter the conſtitution by a conſiderable change in the judiciary ſyſtem, and which had ſo far progreſſed as to have obtained the ſanction of one legiſlative vote. He ſpoke of this as a meaſure extremely dangerous in its nature, and which, if carried into effect, was calculated to deform and injure one of the moſt beautiful features of the conſtitution, and ſo to affect it as to leave nothing or little in it worth preſerving. He concluded his remarks on this point by an earneſt recommendation to thoſe perſons to whom he addreſſed himſelf, to make the neceſſary exertions to prevent the paſſage of this act, which would have made it a part of the conſtitution. There were at leaſt two gentlemen in the room, who were members of the legiſlature, and whoſe fathers, as I underſtood, were members of the convention, which formed the conſtitution of Maryland. Judge Chaſe obſerved that it was a matter of peculiar mortification, or concern, to look at, to ſee, or to know (uſing ſome ſuch expreſſion) ſome gentlemen engaged in thoughtleſsly demoliſhing the fair fabric, which their fathers had toiled with him in erecting.

There is one point of fact in which I differ from the witneſs laſt examined. Judge Chaſe delivered the charge from a written paper, which he had before him. He wore his ſpectacles at the time, and though he turned over leaf by leaf, he occaſionally threw up his head, and ſometimes raiſed his ſpectacles on his forehead, and ſpoke as if he was making what I conſidered an enlargement of the original charge, by extemporary obſervations in addition to what he had written. I cannot charge my memory with any thing further.

SAMUEL H. SMITH *ſworn.*

Mr. *Nicholſon.* Pleaſe to ſtate what you know of the charge delivered by judge Chaſe at Baltimore.

Mr. *Smith.* The charge of judge Chaſe having been publiſhed, I did not expect to be called upon to ſtate in detail its general contents; ſuppoſing that the only enquiry made would be on the correſpondence of my recollection with the contents of the publiſhed charge. I do not know that I ſhould be able, under theſe circumſtances, to give a particular ſtatement, from memory, of its contents. On the evening ſubſequent to the delivery of the charge, I committed to paper the moſt important features of it, which were publiſhed in the National Intelligencer, and which form part of the printed teſtimony received by the committee of enquiry. If I could be indulged with acceſs to it, I ſhould be enabled to ſtate more correctly my knowledge of the charge.

[Mr. Smith here, with permiſſion, read the following (extracted from the National Intelligencer of May 20, 1803.]

After a definition of the offences cognizable by the grand jury, judge Chaſe ſaid he hoped he ſhould be pardoned for making a few additional obſervations. He had, he remarked, been uniformly attached to a free republican government, and had actively participated in our revolutionary ſtruggle to obtain it. He ſtill remained warmly attached to the principles of government then eſtabliſhed. Since that period, however, certain opinions had ſprung up which threatened with ruin the fair fabric then raiſed. It had been contended that all men had equal rights derived from nature, of which ſociety could not rightfully deprive them. This he denied. He could conceive of no rights in a ſtate of nature, which was in fact entirely a creature of the imagination, as there was no condition of man in which he was not, under ſome modification,

ſubject to a particular leader or particular ſpecies of government. True liberty did not, in his opinion, conſiſt in the poſſeſſion of equal rights, but in the protection by the law of the perſon and property of every member of ſociety, however various the grade in ſociety he filled.—Nor did it conſiſt in the form of government in any country. A monarchy might be free, and a republic in ſlavery. Wherever the laws protected the perſon and property of every man, there liberty exiſted, whatever the government was. Such, ſaid he, is our preſent ſituation. But much I fear that ſoon, very ſoon, our ſituation will be changed. The great bulwark of an independent judiciary has been broken down by the legiſlature of the United States, and a wound inflicted upon the liberties of the people which nothing but their good ſenſe can cure.

[Judge Chaſe here went into an aſſertion of the right of the judiciary to decide on the conſtitutionality of laws.]

He then adverted to the proceedings of the legiſlature of Maryland. He commented on the wiſdom and patriotiſm of thoſe who had framed the conſtitution of that ſtate. That wiſdom and patriotiſm had never conceived liberty to conſiſt in every man poſſeſſing equal political rights. To ſecure property the right of ſuffrage had been limited. The convention had not imagined, according to the new doctrine, that property would be beſt protected by thoſe who had themſelves no property. The great rampart eſtabliſhed in the limitation of ſuffrage was now demoliſhed by the principle of univerſal ſuffrage engrafted in the conſtitution. In addition to this, a propoſition was now ſubmitted, whoſe ratification depended upon the next legiſlature, and which, if ratified, would deſtroy the independence and reſpectability of the judiciary, and make the adminiſtration of juſtice dependent upon legiſlative diſcretion. If this ſhall, in addition to that which eſtabliſhes univerſal ſuffrage, become part of the conſtitution, nothing will remain that will be worth protecting. Inſtead of being ruled by a regular and reſpectable government, we ſhall be governed by an ignorant mobocracy. When he reflected on the ruinous effects of theſe meaſures, he could not but bluſh at the degeneracy of ſons, who deſtroyed the fair fabric raiſed by the patriotiſm of their fathers.

Preſident. Did you hear any reflections caſt on the adminiſtration?

Mr. *Smith.* I do not recollect any other beſide thoſe contained in the ſtatement I have read.

JOHN STEPHEN *ſworn.*

I was at Baltimore when the charge was delivered by judge Chaſe. My recollection of its contents is extremely vague. But with regard to ſome parts of it, it coincides with that of Mr. Montgomery, Mr. Maſon, and Mr. Smith. He ſpoke of the repeal of the judiciary law, and ſaid that it was injurious to the independence of the judges. He alſo mentioned the general ſuffrage law as injurious; and ſaid no man ought to be permitted to vote unleſs he had a property in, a common intereſt with, and an attachment to the community; that the act violated this principle, and would be attended with very injurious conſequences; he denied the doctrine of natural rights; and ſaid that they were altogether derived from convention; and at the end of the charge he exhorted the jury to uſe their efforts to prevent the injury likely to reſult from the temper of the times. I cannot ſay whether judge Chaſe confined himſelf to a written paper, or not. He declared that the independence of the judiciary of the United States had been injured by the repeal of the judiciary ſyſtem; and that the bill, then pending before the legiſlature of Maryland, if adopted, would have the ſame effect upon the judiciary of that ſtate.

Mr. *Nicholſon* ſtated that all the witneſſes preſent on the part of the proſecution had been examined; the Managers would therefore proceed to offer certain records; but as ſeveral material witneſſes were abſent, he hoped they would not be precluded from calling them, ſhould they attend, at a future ſtage of the trial.

Mr. *Randolph* offered in evidence a copy of the record in the caſe of J. T. Callender; alſo in the caſe of Fries.

Mr. *Randolph* then ſtated that the Managers had ſubmitted all the evidence they were prepared to adduce. Whereupon the court roſe.

FRIDAY, *February* 15, 1805.

The court was opened at 10 a. m.

Preſent, the Managers, accompanied by the House of Representatives in committee of the whole: and Judge Chase, attended by his counsel.

The evidence being closed on the part of the prosecution, Mr. HARPER, of counsel for the respondent, addressed the court to this effect.

Mr. President—We feel so strong a reliance on the justice, impartiality, and discernment of this honorable court, that nothing but an anxious regard for the character and feelings of the honorable gentleman who is the object of this prosecution, and a solicitude to remove even the slightest imputation of impropriety or incorrectness that may rest on his conduct, could induce us to occupy any portion of that time which we know to be so precious, by the introduction of testimony on his part. We believe the charges to be utterly unsupported, by the testimony adduced on the part of the prosecution; and had we no other object than a mere legal acquittal, we should cheerfully rest the case on that testimony. But we are aware that some parts of the honorable judge's conduct, though not criminal nor punishable by impeachment, may, if left without explanation, appear in an unfavorable light. We are prepared with testimony to give this explanation; to shew that through all the transactions which form the matter of this prosecution, he has been governed by the purest motives, and that whatever errors he may have committed, are trivial in themselves, are imputable to human infirmity alone, and were instantly corrected by himself. This testimony we request the permission of this honorable court to produce. But a consciousness of the strong ground on which we stand, and a recollection of the very important public business which now presses on the attention of this honorable court, in its legislative capacity, have determined us to wave our right to a general opening of our case; and to confine ourselves, in this stage of the cause, to a brief statement of the points to which our testimony will be directed.

On the first article, which relates to the conduct of judge Chase in the trial of John Fries for treason, we

shall produce testimony to shew, that the opinion contained in the paper which the judge delivered to the prisoner's counsel was not only legal, but had been twice expressly decided, and once admitted in the same court, and had before that trial been laid down as a general principle of law, in a charge delivered to a grand jury in the same court, by one of judge Chase's predecessors.

[Here Mr. Harper sat down, while the committee of the whole were entering and taking their seats.]

Mr. Harper then rose and proceeded. He stated that the counsel for the respondent had begun to open their defence, and were stating the ground which they should take in opposition to the first article of impeachment. We shall shew, said he, by the most indisputable testimony, that the point of law respecting treason in levying war against the United States, which was stated in the paper delivered to the counsel of Fries, had been once informally decided by the same court, in a prior case, and twice after solemn argument, and full discussion, and that one of those decisions was made in the case of John Fries himself, on an indictment for the same offence. We shall shew that judge Chase's predecessor had, before counsel was heard, and before an indictment was found, delivered the same opinion in a charge to the grand jury. We shall proceed to prove in a more particular manner the contents of the paper thus delivered to the counsel. We shall produce the original paper itself; and shall prove that delivered to the prisoner's counsel to be a true copy of it; and we shall conclude by shewing that when the counsel of Fries had refused to proceed in his defence, and were informed by the judge that they might go on, and conduct the case as they thought proper, he employed no menacing expression, and uttered no such words as "proceed at the hazard of your characters:" but merely informed them that they should be under no other restriction,

but that which a regard to their professional character would impose. That far from threatening, he did all in his power to sooth; and instead of restricting, gave the utmost latitude of indulgence.

Proceeding then to the second general head of accusation, the conduct of the respondent relative to the trial of Callender, which furnishes the matter of the second article, and embraces in the whole five articles, we shall shew that the copy of the "Prospect Before Us," which the respondent carried with him to Richmond, was marked not by him, but by another person, without any view to a prosecution of the author, and was given to him by that person without any request on his part, as a performance which might amuse him on the road.

As to the private conversation at Annapolis, we shall prove that it was a mere jest between the respondent and the gentleman, who, after treasuring it up for five years, has this day brought it forward to support an impeachment; and whose recollection of it we shall shew to be far less accurate than ought to be required of a man, who after so great a lapse of time adduces a private, confidential and jocular conversation, to aid a criminal prosecution.

We shall then follow judge Chase to Richmond, where we shall shew, that far from having formed a corrupt determination to oppress Callender, he felt solicitous for the escape of that unfortunate wretch; that far from entering into a combination with the marshal to pack a jury for the conviction of Callender, judge Chase expressed a wish that he might be tried by men of that political party, whose cause his book was intended to support. We shall prove, by testimony not to be doubted, that no conversation whatever took place between the judge and the marshal, relative to striking any persons from the pannel, much less such a conversation as has been sworn to by one witness for the prosecution. We shall shew that no

pannel of the jury actually summoned was formed, until the opening of the court on the day when the trial of Callender was to have commenced; that it was completed in open court, and was never seen by the judge. And we shall prove, that the marshal, not by the direction of the judge, from whom he was bound to receive no directions on that subject, but with his entire approbation and according to his advice, took the utmost pains to select a jury of the most impartial, considerate, and respectable men; that in this selection no attention was paid to party distinctions; and that if no persons of Callender's political opinion actually did serve on the jury, it was because, after being summoned, they made excuses, which were admitted by the court, or refused to attend.

Thus much respecting the conduct of the judge previous to the trial. Proceeding then to the particular matter of the second article, which relates to the supposed rejection of John Basset's application to serve on the jury, we shall prove, more fully than we have already done, that the nature of this application has been wholly misunderstood by the witnesses on the part of the prosecution; that the juror did not offer an excuse, or apply to be discharged, but merely suggested some scruples of delicacy, and was willing to serve if those scruples were not sufficient to constitute a legal disqualification. We shall fully corroborate the testimony which the juror himself has given on this head, and shall shew clearly that his scruples were not of such a nature, as to furnish a legal or proper ground of objection to his competence as a juror.

As to the refusal of a continuance, which has been so much relied on as a criminal violation of the law, with intent to oppress the party, we shall prove, that although no legal grounds for a continuance were shewn, and it was therefore not in the power of the court to grant it, judge Chase did offer to postpone the trial for a month or six weeks, in order to accom-

modate Callender and his counsel, and to enable them to prepare; an offer which they thought proper to reject. And we shall also shew, that when this motion for a continuance was made, the law of Virginia, by which it is now contended that the court ought to have been governed, was not cited, nor even mentioned.

With respect to the conduct of judge Chase towards Callender's counsel, we shall prove that it was free from any appearance of harshness, or desire to intimidate, abash or oppress: that the irritation which took place proceeded from the counsel themselves, and that the conduct of the court was far more mild and forbearing than from those irritations could have been expected. That every decision on the law was the joint opinion of judge Chase and his colleague, delivered after consultation between them. That every interruption of the counsel, arose from their pertinacity in pressing points which had been decided, and on which propriety and duty required them to be silent; and that after the respondent had delivered the opinion of the court on these points of law, he offered to assist the counsel for the traverser in framing a case for the opinion of all the judges of the supreme court, and thus to give them an opportunity of correcting any errors which he and his colleague might have committed in those decisions. And finally, we shall produce a witness who having attended the trial and taken down all the proceedings in short hand, will lay before this honorable court an exact detail of all that passed.

Passing then to the matter of the fifth and sixth articles, we shall prove, by a rule solemnly made by the supreme court of the United States, that they never considered the state laws as regulating *process*, by virtue of the act of Congress which is relied on in support of these articles; but merely as governing the decision of rights acquired under them, when such

rights should come into question in the courts of the United States; that the practice in the courts of Virginia, under the state law in question, has been and is conformable to our construction, and not to that contended for on the other side. And as a proof how little the recollection of men, even the most correct, can be relied on, in cases where their feelings have been strongly excited, we shall produce a record, in which the learned gentleman who, though very young, was attorney-general of Virginia in 1800, and who has delivered his testimony with the greatest candor and propriety, did himself order a capias, on a presentment, in a case not capital. We shall produce evidence to prove that the capias is the proper process, in all cases of presentments, except those of petty offences, which are tried by the court, without an indictment, and are punishable by fine only, but not imprisonment. And to remove every possible doubt on this head of accusation, we shall prove that when the presentment against Callender was made, and it became necessary to issue process against him, judge Chase applied to the district attorney for information what was the proper process, who answered a capias; and that the capias which actually was issued was drawn up by the clerk, inspected and approved by the district attorney, and issued on his suggestion.

Respecting the transactions at Newcastle, in the state of Delaware, which constitute the matter of the seventh article, we shall prove that those offensive and improper expressions which are attributed to the respondent, relative to a seditious temper in the state of Delaware, and especially in the county of Newcastle and the town of Wilmington, never were uttered by him; that the witnesses who have deposed to those expressions are under a mistake; and that nothing was said or done by judge Chase on that occasion, but what he has admitted in his answer; but what propriety justifies, and his duty required. To this end we shall

offer the testimony of persons who were in a situation to remark every occurrence; to listen to every expression, and on whom such expressions, had they been uttered, could not have failed to make a strong impression.

We shall then proceed to the charge delivered to the grand jury at Baltimore, which furnishes the eighth and last ground of accusation; and then we shall prove that the respondent said nothing of a political nature to the jury, except that which he has stated in his answer, and which he hopes to satisfy this honorable court he had a right to say, however indiscreet or unnecessary the exercise of that right in this instance may have been. We shall produce an host of witnesses to prove that he never uttered such sentiments as are attributed to him by one witness, relative to the present administration, its character, views and manner of obtaining its power; sentiments which he admits would have been in the highest degree reprehensible on such an occasion; that the charge which was delivered was read from a book; and that he spoke nothing extemporary, as another witness for the prosecution has supposed. And finally we shall produce this book to speak for itself; shall prove it to be the same from which the charge was delivered; and shall conclude with the examination of witnesses who stood round the respondent while he read it, sat by his side, and almost looked over him while he delivered the charge which it contains.

This, Mr. President, will be the general bearing of our testimony; which we shall now, with the permission of this honorable court, proceed to adduce, in the order in which it has been stated.

SAMUEL EWING *sworn.*

Mr. *Hopkinson* (producing a paper)—Be pleased to inform the court whether that is your hand writing.

Mr. *Ewing.* It is in my hand writing so far as the paragraph, at which I have signed my name; it was written by me at the time, and my name signed to it—the remainder is not in my hand writing, and I do not know by whom it is written.

Mr. *Hopkinson.* At what time and from what paper did you make it out?

Mr. *Ewing.* I made it out from the opinion of the court which was thrown down by judge Peters or Chase, and within about half an hour after it was thrown down from the bench. I took the copy home with me, to Mr. Lewis's office, where I was at that time a student. In the afternoon of the same day, Mr. Caldwell, the clerk of the court, called on me, and at the desire of judge Chase and judge Peters, requested that it might be returned; and I gave it to Mr. Caldwell. I made out only one copy, and this is it.

Mr. *Hopkinson.* The paper being proved, I will read it in evidence.

Mr. *Rodney* observed that the original paper was the best evidence, and as one of the copies thrown down from the bench was already before the court, he presumed that ought to be considered as the best evidence.

Mr. *Hopkinson* said he was desirous to read it merely to shew that it corresponded with the copy in the possession of the attorney of the district.

Mr. *Hopkinson* then read the copy in the hand writing of Mr. Ewing (containing the opinion of the court in the case of Fries) which appeared to correspond precisely with the copy adduced by Mr. Rawle.

Mr. *Hopkinson.* Please to state whether you were in the court the day subsequent to that on which the opinion was delivered by the court, and what you recollect occurred at that time?

Mr. *Ewing.* I attended at the court the day succeeding, and I remember that judges Chase and Peters, addressing Messrs. Lewis and Dallas, said they were not to consider any thing which took place the day before as a restriction on the course they wished to pursue; judge Peters said that every thing done yesterday was withdrawn. Judge Chase asked them if they would go on in the cause; some conversation ensued, which ended in the determination of Messrs. Lewis and Dallas not to proceed in the defence of Fries. Judge Chase then made this observation—that if, after the court had expressed

their opinion on the law, they perſiſted in ſtating to the jury their ſentiments on the law, they muſt do it at the hazard of their legal reputations. I did not underſtand this as a menace, but as a declaration to the counſel that they muſt do it on their ſtanding at the bar, and from a regard to their reputations. If I ſtate any thing further, it will be only a recapitulation of the teſtimony already given.

EDWARD I. COALE *ſworn.*

Mr. *Hopkinſon.* Will you examine that paper, and ſay what you know reſpecting it?

Mr. *Coale.* It is a copy of the paper handed down by judge Chaſe on the trial of Fries, made at the inſtance of judge Chaſe, from a paper in his hand writing; there were ſome words in the original which I could not aſcertain; I left blanks for them, and they were filled up by judge Chaſe; the other parts are written by me. It was made out before the trial of Fries. When in the office of judge Chaſe I was frequently in the habit of tranſcribing papers from his hand writing. After I left him I went to Philadelphia, and lived there when Fries was tried. The judge occaſionally, during my reſidence there, ſent for me to tranſcribe his opinions; and on that occaſion he called on me to tranſcribe this paper from the original hand writing of himſelf.

Mr. *Hopkinſon.* Was there a converſation between you and judge Chaſe, in which he aſſigned his reaſons, and what were they, for making out this opinion?

Mr. *Nicholſon* objected to the putting of this queſtion.

The *Preſident* deſired Mr. Hopkinſon to reduce it to writing.

Mr. *Nicholſon* ſaid he would withdraw his objection rather than occaſion delay. Some objection, however, ariſing on the part of the court,

Mr. *Hopkinſon* ſubmitted, in writing, the following queſtion:

At the time judge Chaſe deſired you to make the copy in your hand, did he, or did he not, explain to you his reaſons or motives for drawing up the paper, from which this copy was made? If yes, what were they?

Mr. *Hopkinſon* ſaid he thought ſuch queſtions perfectly legal, when they went to ſhew the intention of the accuſed. We

have heard, said he, much of the *quo animo*; and it is perfectly clear, that the intention constitutes the guilt of the offence.

Mr. *Nicholson.* The *quo animo* is to be collected from the acts of the party. The evidence of his declaration may be shewn to prove the *quo animo.* But I do not consider it to be correct that judge Chase shall be permitted to give in evidence declarations made at any other time than that when we have stated he made them; otherwise it will always lay in the discretion of the party accused to state declarations made at another time by him for the purpose of justifying any acts he may have committed.

Mr. *Martin* said he had ever considered the declaration of the party at the time he was charged with committing a criminal act, as competent evidence to shew his innocence.

Mr. *Nicholson* said there was no doubt of it; but that he was not charged with drawing out the paper as a criminal act. Any declaration made by judge Chase at the time he delivered the opinion of the court, may be given in evidence; but any other declarations have nothing to do with the case.

The *President.* Where was the conversation between the judge and yourself?

Mr. *Coale.* At the judge's lodgings.

The question was then taken on permitting the question to be put, and passed in the negative.—Yeas 9—Nays 25.

Mr. *Hopkinson* next offered a certificate of the clerk of the circuit court of Pennsylvania, to shew that at the trial of Fries in 1799, there were 86 civil suits depending.

Also a copy of the indictment on the first trial of Fries.

Also a part of a charge delivered by judge Iredell at the term when Fries was tried, taken from Carpenter's report of that trial, page 14.

Mr. *Campbell* intimating some objection to receiving this paper in evidence,

The *President* said it might be read as a report of the case; but what credit it would deserve, it would be for the court to determine.

Mr. RAWLE was again called in.

Mr. *Hopkinson.* You were district attorney at the trial of Fries. I will ask you whether the restriction of the court as to arguing the point of law was not applied to the counsel of the United States, as well as to those of the prisoner?

Mr. *Rawle.* I certainly did conſider the reſtriction as impoſed upon us both.

Mr. *Hopkinſon* ſubmitted extracts from 2d Dallas, pages 346, 348, to ſhew that in the caſes of Vigol and Mitchell the crime of high treaſon was completely ſettled by the court, and was the ſame as defined by judge Chaſe in the trial of Fries.

WILLIAM MEREDITH *ſworn.*

Mr. *Hopkinſon.* Were you preſent at the trial of Fries?

Mr. *Meredith.* On the 22d day of April, 1800, I went to the court houſe for the purpoſe of attending the trial. It was rather at a late hour; I think after eleven o'clock, before I reached the court houſe, I met ſeveral perſons coming from the court room; I thought therefore that the court had adjourned, but not ſeeing any of the gentlemen of the bar, or the judges, I went on; when I came into court, I ſaw judge Chaſe holding a paper in his hand, and he ſaid that the court had with great deliberation conſidered the overt acts in the indictment againſt Fries, that they had made up their minds on the extent of the conſtitutional definition of treaſon, and that to prevent their being miſunderſtood, they had committed their opinion to writing, one copy of which was intended to be given to the diſtrict attorney, another to the counſel for the priſoner, and a third to be given to the jury; perhaps ſomething elſe might have been ſaid, but I do not recollect it. The paper was then thrown down by him to the bar, and a ſentiment of this kind was expreſſed by judge Chaſe—that this opinion was not intended by the court to prevent the counſel from proceeding in the uſual manner. I felt a deſire to take a copy of the paper—I do not recollect whether more than one was thrown down. I had not, however, an opportunity of doing it. The paper was ſo fully occupied till the adjournment of the court, that although I made two or three attempts to obtain it, I could not ſucceed. The court adjourned a ſhort time afterwards. After I went home I recollect that an application was made to me by the clerk of the court to return the copy, which he underſtood I had taken.—I informed him I had not taken a copy. On the following day I was in the court room at the opening of the court.—Fries was put to the bar, and the judge then enquired whether

the counſel were ready to proceed on the trial. I remember Mr. Lewis addreſſing himſelf to the court, and objecting to proceed in the defence, becauſe the counſel had been reſtrained by the court from proceeding in the manner which they deemed moſt beneficial to their client. I remember alſo that judge Chaſe told him that he ought not to refer to the opinion which had been delivered on the preceding day; that the counſel were not to be bound by that opinion, as it had been withdrawn. Mr. Lewis referring to that opinion, however, conſidered it as the formed and decided opinion of the court, and that although the court had withdrawn it, it ſtill would have an operation upon their minds; that while the court was under its influence, they could not expect to be heard in any of their arguments to effect. Judge Peters replied that the opinion was withdrawn, and I think judge Chaſe repeated the opinion before expreſſed, that the counſel were not to be bound by that opinion, might enter fully into the caſe and argue as well on the law as on the fact before the jury. I recollect Mr. Lewis ſtating to the court his opinion of the appoſiteneſs of caſes decided at common law in England. I remember judge Chaſe's expreſſing his opinion and belief that they were perfectly inapplicable; and, afterwards remarking, that if, however, the counſel would go on, it was not the intention of the court to circumſcribe them, or to take from the jury the deciſion of the law as well as the fact. He further added, that the counſel might manage the defence in ſuch way as they thought proper, having a regard to their own characters. I am the more particular and poſitive of theſe expreſſions, becauſe very ſhortly after the trial I made a ſummary of the proceedings. I find it ſtated as coming from the mouth of judge Chaſe, and that he repeated that the counſel for the priſoner might go on in their own way, having a regard to their own characters. Judge Peters made a remark which I thought was calculated to put the counſel into good humor, but they perſiſted in their refuſal to proceed. Thus far the court manifeſted, in my opinion, a deſire that the cauſe might progreſs, and a perſuaſive and conciliatory temper; but Mr. Lewis having again decidedly ſaid that he would not proceed, judge Chaſe ſaid, if you ſuppoſe by conduct like this, to put the court into a difficulty, you are miſtaken. After a pauſe, judge Chaſe addreſſed himſelf to the priſoner, and aſked him, if he was ready to proceed on his trial, or whether he

would have other counſel aſſigned to him. Fries replied he did not know what was beſt for him to do, but he would leave his caſe to the court. Mr. Rawle ſtated that from the peculiarity of the circumſtances of the caſe, and the priſoner being left without the aſſiſtance of counſel, his wiſh was that the trial might be poſtponed for a day, and the poſtponement took place by order of the court. The following morning when the court was aſſembled, Fries was again put to the bar, and judge Chaſe enquired of him whether he wiſhed the court to aſſign him counſel? His reply was, that he would truſt himſelf to the court and jury. Judge Chaſe replied, then by the bleſſing of God, the court will be your counſel, and will do you as much juſtice as could be done by the counſel that were aſſigned you, or nearly in thoſe words. The trial proceeded, but I was not preſent during the whole of it.

Mr. *Hopkinſon.* Do you recollect whether judge Chaſe guarded the priſoner againſt putting any improper queſtions to the witneſſes, &c.

Mr. *Meredith.* Judge Chaſe ſeemed to me to perform his promiſe. He told him he had a right to put any queſtions he pleaſed, and guarded him againſt putting improper ones.

Mr. *Harper* ſaid he would next proceed to the caſe of Callender.

LUTHER MARTIN *ſworn.*

Mr. *Harper.* Did you furniſh judge Chaſe with a copy of the book, entitled the Proſpect Before Us, and at what time did you furniſh him with it?

Mr. *Martin.* It is not a pleaſing thing for me to be a witneſs on this point, as I may be conſidered as a party concerned, and eſpecially from being one of the counſel for judge Chaſe. Yet, as it is required from me, I will proceed to ſtate what I know. When I was in New York, I obſerved in a newſpaper which I took up at a barber's ſhop an advertiſement for the ſale of the Proſpect Before Us. I mentioned it to judge Waſhington, and he ſent his ſervant to procure a copy; and I deſired him to purchaſe two copies. I read it, and as was uſual with me with reſpect to books any wiſe intereſting, I ſcored ſuch paſſages as were remarkable either for their merit or demerit; and I did ſcore a great portion of the book. But I did not ſcore them with the leaſt idea of an in-

dictment being founded upon them. When I ſcored the book I did not know that judge Chaſe was going on the circuit of Virginia. My ſcoring was for my own amuſement, and for that of my friends. Afterwards I ſaw judge Chaſe. I aſked him if he was going down to Richmond; he anſwered yes. I aſked if he had ſeen the book called the Proſpect Before Us; he ſaid he had not. I then told him, I will put it into your hands, you may amuſe yourſelf with it as you are going down, and make what uſe of it you pleaſe. There was a great deal more ſcored than was contained in the indictment. I moſt ſolemnly declare that I had no view to a proſecution in ſcoring it; though I have no heſitation in ſaying that in common with every worthy inhabitant of America I deteſted the book.

Mr. *Nicholſon.* What do you mean by deteſt?

Mr. *Martin.* I am ready candidly to acknowledge that I did think it a book that ought to be proſecuted; and I did not think that judge Chaſe would have an opportunity of ſeeing it unleſs I gave him a copy of it. Having ſince heard it ſuggeſted that I had ſome ſhare in drawing up the indictment againſt Callender, I moſt ſolemnly declare I did not put pen to paper on the ſubject.

Mr. *Harper.* Was not your name written on the book?

Mr. *Martin.* It was.

Preſident. Did you expreſs the view you had in putting it into his hands?

Mr. *Martin.* I ſaid what I have already ſtated; that he might take it down with him, and make ſuch uſe of it as he pleaſed.

JAMES WINCHESTER *ſworn.*

Mr. *Harper.* Will you pleaſe to ſtate whether you were in Annapolis in 1800, in court with judge Chaſe, and Mr. John T. Maſon; and what was the converſation which then took place?

Mr. *Winchester.* I attended a circuit court held at Annapolis in 1800. I do not recollect either the day the court commenced or ended. I think on the laſt day of the term ſentence was paſſed on —— Saunders for ſtealing in his character of poſt-maſter the contents of a letter. A crowd ga-

thered round the door, and retarded our paſſage out of court. I do not remember what perſons remained; but Mr. Maſon came up, and addreſſed himſelf to judge Chaſe. My recollection is at beſt but imperfect; and of this converſation neceſſarily indiſtinct. In the account of it therefore I ſhall uſe my own language. I may occaſionally uſe the language of judge Chaſe and Mr. Maſon. According to the impreſſion on my mind, the converſation commenced in this way. Judge Chaſe had delivered a charge to the grand jury. Mr. Maſon came up, and in a laughing manner jocoſely aſked in what light are we to conſider the charge, as moral, political, judicial, or religious? Theſe are the words, I believe; but of this I am not certain. The judge replied in the ſame ſtile and manner, I believe, that it was a little of all. I cannot be certain, but I think Mr. Maſon intimated to the judge, that he would not deliver ſuch ſentiments in Virginia. It appeared to me that the language of Mr. Maſon conveyed to judge Chaſe the idea, that he was afraid to deliver ſuch ſentiments in Virginia, though I am not myſelf confident that ſuch was his meaning. The judge replied that he would, and that he would at all times and in all places execute the laws in the manner he had declared. The converſation then turned on the book called the Proſpect Before Us; as well as I remember it was ſpoken of as a book written by Callender. The converſation which paſſed on the ſubject I cannot pretend to relate at all, more than that I have a ſtrong impreſſion on my mind that judge Chaſe mentioned that Mr. Martin had put the book into his hands, that he would take it with him to Richmond, and lay it before the grand jury, and have it preſented. I heard Mr. Maſon's teſtimony, and my recollection correſponds with his, that the whole converſation was jocular. I do not remember the particular expreſſions which Mr. Maſon relates; but I cannot ſay that they were or were not made. Becauſe my attention was not very pointedly directed to the converſation, and at the time, from the laughing which took place, I might not have heard the expreſſions though they had been uſed.

Mr. *Harper*. What is the expreſſion you do not recollect?

Mr. *Winchester*. That if the whole ſtate of Virginia was not depraved, he would carry the book down with him, and have the fellow indicted.

WILLIAM MARSHALL *ſworn.*

Mr. *Harper.* Inform the court how ſoon you ſaw judge Chaſe after his arrival at Richmond, what paſſed between you, &c.?

Mr. *Marſhall.* Judge Chaſe arrived in Richmond, but whether on the 21ſt or 22d of May, I do not recollect; but my impreſſion is that it was Tuesday. I waited on him, as was uſual with me, and gave him information reſpecting the ſtate of the docket. The aſſociate judge did not attend on the 22d, when the court was opened and the grand jury received their charge. They went to their room, and did not return till Saturday the 24th of May, when they returned a preſentment againſt James T. Callender, which I have. [The original preſentment was produced by the witneſs, read, and delivered to the Secretary.]

As ſoon as I had read the preſentment, at the requeſt of the attorney of the diſtrict the jury were taken back to their chamber, and progreſs was made in preparing the indictment. There was ſome converſation between judge Chaſe and Mr. Nelſon, which laſted for a few minutes. Judge Chaſe enquired what was the proper proceſs on the preſentment. The anſwer which the diſtrict attorney made, was, that he ſuppoſed a capias was the proper proceſs. I recollect that judge Chaſe ſaid ſomething of a bench warrant, which was a practice unknown to us. Judge Chaſe aſked me to draw the warrant. I ſaid I could not. He then ſaid he would endeavor to draw it. Afterwards judge Chaſe deſired the diſtrict attorney to draw out the form of a capias; the judge ſaid he would draw one himſelf, and that I might draw out another; and he ſaid he would take the moſt approved of the three. I recollect mine was drawn firſt; but whether before judge Chaſe and Mr. Nelſon had finiſhed theirs, I do not recollect. On looking over mine, he ſaid he was better ſatisfied with mine than his own; and he requeſted me to ſign, ſeal and deliver it to the marſhal.

[Mr. Marſhall here produced and read the original capias.]

On Saturday the 24th of May, in the afternoon, the grand jury brought in the indictment. I have taken theſe circumſtances from a copy of the minutes of my office, which if the court wiſh to ſee, I can produce, as I have them with me. Judge Chaſe alone formed the court from the 22d to the 29th of May, incluſive. On the 27th of May the marſhal brought

Callender into court, judge Chaſe being at that time the only member of the court. A chair was handed to him, and he remained in court while the court proceeded with the docket in the uſual way, until near evening, when judge Chaſe obſerved that as the traverſer was in court, he might perhaps have ſome application to make. I do not recollect whether the counſel afterwards employed for the defence of Callender were then in court; but if they were they made no obſervations. But Mr. Meriwether Jones, with whom Callender reſided, ſaid that Callender was not then prepared to make any application; but that perhaps to-morrow he would move a continuance. Then judge Chaſe applied to Callender, and aſked if he could give bail. Mr. Jones replied that he could give bail in a moderate ſum. Judge Chaſe aſked Callender what were his circumſtances; that in fixing the ſum, he would be governed by that circumſtance. Callender ſaid they were nearly equal. The judge repeated the queſtion; and then Callender ſaid he was indebted about two hundred dollars, and there was about as much due to him which he expected to receive; and therefore he did not conſider himſelf worth any thing. Judge Chaſe then aſked if he could give bail, himſelf in two hundred dollars, and another in a like ſum. The reply made by Mr. Callender, or Mr. Jones was, that he could find bail to that amount; and he accordingly gave bail. On the 28th May, an application was made by Mr. Hay; this was the firſt inſtance in which Mr. Callender took any ſteps for his defence. Mr. Hay ſtated that he was not well acquainted with the practice in ſuch caſes; that he had an affidavit, of a general nature, ſtating the impoſſibility of going into the trial, with any proſpect of ſucceſs, without the attendance of a number of witneſſes who lived at a great diſtance. Mr. Hay alſo enquired whether a general affidavit was ſufficient, or whether a ſpecial affidavit, ſtating the names of the witneſſes and the facts they were expected to prove, would be required. Judge Chaſe ſaid that the ſtrict practice of the law required a ſpecial affidavit; but they might take till to-morrow to prepare a ſpecial affidavit, ſubmitting it to their diſcretion to manage the cauſe as they thought proper. I beg pardon for being a little too haſty in my narrative. When Mr. Hay offered his motion for a continuance, the court ſaid that before they could hear the motion it was neceſſary that the traverſer ſhould plead to the indictment. For if he plead-

ed guilty, there would be no neceſſity for ſuch an application. Mr. Hay aſſured the court that the traverſer would not plead guilty. Mr. Callender was arraigned and he pleaded not guilty; and then the converſation, which I have ſtated, took place. The reply of judge Chaſe was, after a general affidavit is made, it muſt be relied on, but you may withdraw the general, and file a ſpecial affidavit. Nothing further paſſed on the 28th. On the 29th in the morning, Mr. Hay produced a ſpecial affidavit; I have the original here. It is ſtated therein that there were a number of witneſſes; one from New-Hampſhire; one from Maſſachuſetts; ſome from Pennſylvania, and ſome from South-Carolina, abſent; who were material witneſſes for his defence; that there were alſo ſundry documents neceſſary to be procured; and an eſſay written by Mr. Adams on canon and feudal law, which the traverſer ſuppoſed it important to have for his defence. Mr. Hay on theſe grounds moved for a continuance to the next term, in a pretty long ſpeech. Judge Chaſe obſerved that every perſon before he made a publication, if he meant to juſtify it, ought to know the names of his witneſſes, and if he meant to juſtify it by documents, they ought to have been within his reach. It was not to be preſumed, indeed, that he could calculate upon being able to procure his witneſſes in a few days. That in this caſe it was alleged that one witneſs reſided in New-Hampſhire, which was a great way off. He ſaid that the ordinary ſittings of the court would be too ſhort for him to obtain witneſſes from ſo great a diſtance. He ſaid that the priſoner ſhould have time, and he ſhould have a fair trial; but he could not allow him to the next term. He ſaid he might have two weeks—but that might be too ſhort a time—you may have three weeks, a month, nay ſix weeks. We cannot ſit ſo long, becauſe we are obliged to hold a court in the diſtrict of Delaware; but I will adjourn this court, to go to Delaware, and will return in ſix weeks. In the courſe of the obſervations offered by Mr. Hay to the court, as well as I can recollect, he ſaid if the documents and witneſſes were here, he did not think he would be prepared during that term to inveſtigate all the facts and the law ariſing on them; but he would be prepared againſt the next term, if the court would indulge him with a continuance. After judge Chaſe had made this offer of a poſtponement, I do not diſtinctly remember that Mr. Hay or Mr. Nicholas made any reply. After a ſhort interval judge

Chaſe ſaid, as they did not ſeem diſpoſed to take the time I have offered, the trial ſhall come on within the time the teſtimony of the witneſſes reſiding in Virginia, deemed material, can be procured. He aſked the marſhal what was the diſtance of the reſidence of Mr. Giles and general Maſon; and at what time they could conveniently come to Richmond; and whether his deputy marſhals could go for them. The reply of the marſhal was that his deputies were prepared to execute any orders of the court. Judge Chaſe then directed me to make out the ſubpœnas for Monday the 2d of June; and I iſſued ſubpœnas for Meſſrs. Giles, Maſon, and Taylor; but colonel Taylor's name does not appear in the affidavit. The deputy marſhals were directed to uſe all poſſible expedition in ſerving the ſubpœnas: they were all returned executed on Monday the 2d of June, endorſed with the hour of the day on which they were executed.

[Here Mr. Marſhall offered the originals with the endorſements of the time of ſervice.]

On Monday the 2d day of June, colonel Taylor appeared in court. The other witneſſes were called, but they did not appear. A poſtponement was aſked by one of the gentlemen for two hours, who ſtated that it had rained on Sunday preceding, which might have impeded travelling, and it was granted. Some time in the courſe of the day judge Chaſe obſerved that he might have till to-morrow, which was accepted.

On Tueſday morning ſoon after the opening of the court, the motion for a continuance was renewed, founded on the affidavit of Callender, which gave riſe to the firſt motion.—Judge Griffin was then in court, having arrived on the 30th of May, and continued during the remainder of the term. It was argued much at length, and received the ſame deciſion as on the 29th. The marſhal was then ordered to call the petit jury; twelve jurors appeared; there were ſome objections, which I do not preciſely recollect, to the pannel of the jury; and a motion made to quaſh the array; an argument was made and ſome authorities quoted. Judge Chaſe ſaid they were not to be relied on, and he aſked for Coke upon Lyttleton. I brought it from the library in the capitol; judge Chaſe looked into it, and ſaid the array ſhould not be quaſhed; but I do not know the principle on which he decided. When the jury had all anſwered, the gentlemen propoſed to propound a queſtion to the jurors as they came to the book. I do not recollect what

the queſtion was; but judge Chaſe ſaid he would propound the proper queſtion himſelf. The queſtion which judge Chaſe ſaid it was proper to propound was, have you formed and delivered an opinion (for he ſaid it was neceſſary to have delivered as well as formed it) on the indictment? The anſwer of the firſt juror was that he had never ſeen or heard the indictment, and could not ſay that he had formed an opinion reſpecting it. Eight or nine of the jurors were aſked the ſame queſtion, and gave a like anſwer. The gentlemen who defended the traverſer then ſaid it was unneceſſary to aſk the other jurors that queſtion; the reſt were ſworn, and the trial proceeded. The courſe it took was pretty lengthy, and I cannot ſtate all the circumſtances that took place. I recollect that the teſtimony of colonel Taylor was refuſed, but I do not recollect the particular circumſtances attending it.

Mr. *Harper*. Did any thing paſs between you and judge Chaſe, reſpecting the jury ſummoned to try Callender?

Mr. *Nicholſon* made ſome objection to this queſtion.

Mr. *Harper* replied in ſupport of it.

The objection was then withdrawn by the Managers; but further objection being made by a member of the court,

The *Preſident* deſired the queſtion to be reduced to writing, which was accordingly done by Mr. Harper, as follows:

Teſtimony on the part of the proſecution, tending to ſhew from the declarations of the reſpondent, that he had a corrupt intention to pack a jury for the trial of Callender, having been given; he offers in evidence other declarations of his, made during the proceedings, but on a different day, for the purpoſe of rebutting the former teſtimony, and of ſhewing that his intentions, in that reſpect, were pure, and even favorable to Callender.

When the Senate decided that it ſhould be put.—Yeas 32—Nays 2.

Mr. *Marſhall*. Mr. Giles was on a jury in the circuit court, on, I think, the 27th of May, the day Callender was brought into court by the marſhal. When Mr. Giles's name was called, judge Chaſe aſked me whether that was the celebrated Mr. Giles, member of Congreſs. I ſaid that it was. He ſaid that he had never ſeen him before. Nothing more paſſed at that time. In the evening I was at judge Chaſe's lodgings. He aſked me whether I ſuppoſed Mr. Giles would remain in Richmond until the trial of Callender. I ſaid it was

uncertain, that it was not cuſtomary for Mr. Giles to remain any length of time when he came to town. Judge Chaſe ſaid he wiſhed he would remain, and ſerve in Callender's caſe; nay he wiſhed that Callender might be tried by a jury of his own politics. He ſaid that if his ſituation as a judge would permit him to drop a hint to the marſhal with reſpect to the jury, he would intimate his wiſh that Callender ſhould be thus tried; but in his ſituation it would be improper for him to interfere with the duty of the marſhal.

Mr. *Harper*. Inform the court at what time, if any, you were at judge Chaſe's chambers, when a certain Mr. John Heath was there, what paſſed, and what did not paſs.

Mr. *Marſhall*. Judge Chaſe was, as he informed me, a total ſtranger at Richmond, and had never been there until he held the court in 1800. He aſked me if I would call upon him from time to time. When I knew he was at home, I uſed to go in an evening, and ſpend an hour or two with him at his lodgings. I alſo generally went in the morning, about an hour before the meeting of the court. I recollect about ten o'clock, going to Mr. Chaſe's lodgings. I went, I think, but of this I am not poſitive, with Mr. Randolph. I found Mr. Heath in judge Chaſe's chamber, or in the paſſage. Mr. Heath was, I think, in the act of leaving the room, he had his hat in his hand, and I met him either in his way out of the room, or in the paſſage.

Preſident. Can you ſtate the day of the month?

Mr. *Marſhall*. I cannot, but I think it was the day before judge Griffin arrived. I recollect very well, on that day Mr. D. Randolph and myſelf walked up to the court room. I was ſurpriſed at ſeeing Mr. Heath at judge Chaſe's, and aſked Mr. Randolph what could have brought him there.

Mr. *Harper*. Was Mr. Heath in the act of going out when you entered?

Mr. *Marſhall*. Yes, ſir, he was on the floor, he had taken his leave, as I ſuppoſed, of judge Chaſe, and was either out of the room, or in the act of coming out of it. I do not recollect poſitively whether Mr. Randolph went with me. I recollect going with Mr. Randolph to court, and that it was the uſual practice of Mr. Randolph and myſelf to go to judge Chaſe's chambers in the morning and attend him to court. I do not certainly recollect whether that morning we went together to the judge's chambers, but I am poſitive we left the

chamber together. The court met generally at 11 o'clock. I had ſomething particular to do that morning, and it was from 10 to half paſt 10 when I went to the judge's chambers—it may have been about 10; the time I ſaw Mr. Heath muſt have been about 10 o'clock.

Mr. *Harper.* Did any converſation take place between the judge and Mr. Heath while you were there?

Mr. *Marſhall.* I believe I met Mr. Heath outſide of the door. There was not a word of converſation at any rate.

Mr. *Harper.* Did any incident take place reſpecting a paper handed from Mr. Randolph to Mr. Chaſe?

Mr. *Marſhall.* There did not.

Mr. *Harper.* Did you hear any thing about creatures called democrats?

Mr. *Marſhall.* I never heard any thing paſs between them. I never heard the judge ſay any thing about the jury, except what occurred either at the judge's lodgings or at court, which I took to be inſtructions to ſummon 24 jurors above twenty five years of age, and free-holders; that there ſhould be enough to ſupply the juries required at that court.

Mr. *Harper.* Did he direct them to be ſummoned from the country or the town?

Mr. *Marſhall.* I have ſtated all that I remember relative to the ſummoning of the jury.

Mr. *Harper.* Did he ſay any thing of the deſcription of perſons, relative to parties?

Mr. *Marſhall.* I do not recollect that he ſaid a word.

Mr. *Harper.* Did you make it a practice to go with the judge to court every day from his lodgings?

Mr. *Marſhall.* I walked every day with him, I made it an uniform practice. The judge's lodgings were on my way to court, not more than twenty yards out of my way.

Mr. *Key.* When the ſubpœnas were returned on the 2d of June, and neither Mr. Giles nor general Maſon appeared, was there an application made to the court to allow a further time for their appearance?

Mr. *Marſhall.* There were ſome obſervations made, but I do not recollect whether I attended to them at the time or not; but I think judge Chaſe offered to iſſue an attachment for them, and left it to the pleaſure of the traverſer to ſay whether he would have compulſory proceſs iſſued.

Mr. *Key.* Do you recollect, ſir, whether that was applied

for by the counſel, or whether it was a voluntary offer on the part of the court?

Mr. *Marſhall.* I underſtood that it was a voluntary offer on the part of the court.

Mr. *Harper.* Did judge Chaſe confer with judge Griffin upon the motion for a continuance, and upon the rejection of colonel Taylor's teſtimony?

Mr. *Marſhall.* I ſat very near them, and I frequently heard them in converſation in a ſort of whiſper.

Mr. *Harper.* Did you ever hear any part of the converſation between them?

Mr. *Marſhall.* I did not hear any thing diſtinctly, but when Mr. Baſſet was ſworn, after having ſtated the ſituation in which he ſtood, judge Chaſe aſked him whether he had formed an opinion who was the author of the Proſpect Before Us; he replied that he had not formed an opinion of the author, but he had formed an opinion of the book, and had ſaid that the author ought to be puniſhed. Judge Chaſe then turned to judge Griffin, and ſaid that the queſtion propounded by the counſel would prevent the formation of a jury with reſpect to a notorious murder, as every man in the county where it had been committed might have declared that the perpetration ought to be puniſhed. In that caſe there would not be in the whole county a competent jury. Judge Chaſe then ſaid, let him be ſworn. I do not know poſitively that judge Griffin concurred in that opinion; but I think, from what I heard, that he did.

Mr. *Harper.* Did this converſation take place prior to the declaration of the opinion of the court by judge Chaſe?

Mr. *Marſhall.* I cannot ſay with certainty, becauſe judge Chaſe ſometimes ſpoke without conſulting judge Griffin.—I do not recollect any caſe in which they held a conſultation, but that on the rejection of the teſtimony of colonel Taylor, and the direction that Mr. Baſſet ſhould be ſworn on the jury. He was conſulted as to the teſtimony of colonel Taylor, but I did not hear him declare his aſſent aloud, but I took it for granted, as it was not denied.

Mr. *Harper.* With reſpect to the motion for a continuance, do you know whether the deciſion was made after a conſultation with judge Griffin?

Mr. *Marſhall.* I do not recollect that any thing was ſaid on the part of judge Griffin; but I underſtood that it was aſſented to, as it was delivered as the opinion of the court.

Mr. *Harper*. Was there any expreſſion on the part of judge Griffin of diſapprobation of what was delivered by judge Chaſe as the opinion of the court?

Mr. *Marſhall*. None, ſir.

Mr. *Nicholſon*. At the time of the trial of Callender, was it not the cuſtom of the judges to chooſe their circuits?

Mr. *Marſhall*. I believe it was, ſir.

Mr. *Nicholſon*. At that time, the Virginia diſtrict was within judge Chaſe's circuit, and do you recollect that he ſaid he would not continue the cauſe till the next term?

Mr. *Marſhall*. I recollect that judge Chaſe ſaid he would not continue it till the next term.

Mr. *Nicholſon*. Who preſided at the next term?

Mr. *Marſhall*. Judge Paterſon.

Mr. *Randolph*. You have ſaid that on the morning when you found Mr. Heath about retiring from judge Chaſe's chamber, you did not recollect whether the marſhal accompanied you there or not?

Mr. *Marſhall*. I do not recollect whether he did or not, but the probability, as reſting on my mind, is that he did.

Mr. *Randolph*. Did he accompany you from the lodgings of judge Chaſe to the court?

Mr. *Marſhall*. Yes, I am certain of that, becauſe I had the converſation with him which I have mentioned.

Mr. *Randolph*. You mentioned a converſation you had with judge Chaſe on the ſubject of the political characters ſerving on the jury; that he wiſhed that Mr. Giles, and other gentlemen of the ſame political character, might ſerve on the trial of Callender; did you mention that converſation to the marſhal?

Mr. *Marſhall*. I do not remember to have converſed with him on that ſubject?

Mr. *Randolph*. Were you acquainted with the gentlemen who ſerved as petit jurors on Callender's trial?

Mr. *Marſhall*. Yes ſir.

Mr. *Randolph*. Is there any one of them that comes under the deſcription of being of the ſame political character with Mr. Giles?

Mr. *Marſhall*. I believe not, ſir. At the time of the trial, I was not fully acquainted with the political characters of the gentlemen that ſerved on the jury; but ſince I have learned, as I then conceived, that none of them were of the ſame politics with Mr. Giles.

Mr. *Randolph.* If I underſtood you right, ſir, you ſtated that a capias was ordered to be iſſued before the grand jury returned the indictment a true bill.

Mr. *Marſhall.* I ſaid on the preſentment a capias was iſſued for the arreſt of Callender, which was before the indictment was found.

Mr. *Nicholſon.* The indictment was found on the 24th of May, was it not ſir?

Mr. *Marſhall.* The preſentment was made on the morning of that day. The court ſat longer than uſual, and I remember that the jury wiſhed to be diſcharged, but they were not, and it was five or ſix o'clock before they brought in the bill of indictment.

Mr. *Nicholſon.* Do you recollect whether the attorney of the diſtrict had commenced drawing the indictment before the preſentment was made?

Mr. *Marſhall.* I remember that the diſtrict attorney was drawing up the indictment before the preſentment was made; he had made however very little progreſs in it at that time, it was finiſhed afterwards as ſoon as convenient, and tranſmitted to the grand jury.

Mr. *Randolph.* During the courſe of that trial, pray, ſir, tell the court were the interruptions of the counſel for the traverſer more frequent than you have been in the habit of witneſſing?

Mr. *Marſhall.* I have rarely ſeen a trial where the interruptions were ſo frequent.

Mr. *Randolph.* Do you remember a ſingle inſtance?

Mr. *Marſhall.* I think in a trial where judge Iredell preſided there were interruptions which were as frequent, if not more frequent than took place in the courſe of this trial.

Mr. *Randolph.* Do you recollect any thing diſreſpectful on the part of the counſel towards the court on the trial of Callender?

Mr. *Marſhall.* One of the counſel, Mr. Hay, appeared to be under a great deal of irritation during a great part of the trial.

Mr. *Randolph.* Did you perceive any cauſe for this?

Mr. *Marſhall.* The court were very poſitive that the jury ſhould not be addreſſed by the traverſer's counſel on the conſtitutionality of the ſedition law, and whenever that point was touched by the counſel, there was as much deciſion ſhown by the court as I ever witneſſed.

Mr. *Randolph.* Was there much mirth among the bye-ſtanders?

Mr. *Marſhall.* There was a good deal. I cannot ſay what gave riſe to it, but it was kept up during the courſe of the trial. The court was extremely facetious during that part of the trial which I particularly attended to, but I was not very attentive to the trial till that morning.

Mr. *Martin.* What was the cauſe of the interruptions?

Mr. *Marſhall.* It was the counſel perſiſting in addreſſing the jury on the unconſtitutionality of the ſedition law after the court had declared what was their opinion of the law on that point.

Mr. *Randolph.* Do you recollect any particular expreſſions uſed by the court on this ſubject?

Mr. *Marſhall.* I heard judge Chaſe ſay that the counſel for the traverſer were miſtaken in their expoſition of the law, and they kept preſſing their miſtakes upon the court; he ſaid ſo once, if not oftener.

Mr. *Harper.* You ſay, ſir, that there was no gentleman on the petit jury of the ſame political opinion with Mr. Callender or Mr. Giles. Do you mean on the jury that tried Callender, or on the pannel?

Mr. *Marſhall.* On the jury that tried Callender.

Mr. *Harper.* Were there any on the pannel?

Mr. *Marſhall.* There were colonel Harvie, Mr. Radford, and Mr. Marks Vanderval. Mr. Harvie was called very early, and Mr. Marks Vanderval; but it appeared to me that there was a great unwillingneſs on the part of thoſe gentlemen to be on the jury to try this cauſe, and ſeveral applications were made to have them excuſed.

Mr. *Harper.* How did it happen that none of thoſe gentlemen ſerved?

Mr. *Marſhall.* Mr. Harvie ſuggeſted that he was ſheriff of Henrico county, and that the county court was ſitting at the time; that his preſence was required, and on that ground the court excuſed him from ſerving on the jury. The other two gentlemen did not attend at all.

Mr. *Harper.* When you ſaid that the confuſion on this trial took place, from the counſel's preſſing their opinion on the jury, do I underſtand you as ſaying that it was after they (the counſel) had been over-ruled by the court?

Mr. *Marſhall.* I ſo underſtood it, I did not perceive any other cauſe.

Mr. *Harper.* What took place on the motion for a continuance? The affidavit filed, ſtated, that the traverſer could not produce his witneſſes; did it ſtate that he could prove a juſtification as to all the charges in the indictment?

Mr. *Marſhall.* No, ſir, not that I remember, but the affidavit is here on file. It was ſtated by judge Chaſe, that there were 19 charges in the indictment, and that it was neceſſary for the traverſer, in order to procure his acquittal, to prove the truth of the matter in the whole; it was not ſufficient to prove a dozen or more of them to be true, if he could not prove them all. It was not ſufficient to prove a part inſtead of the whole of any one charge; for example, ſuppoſe a man ſhould charge me with being a great ſcoundrel, a rogue, and a very ugly fellow, and he ſhould prove that I was a very ugly fellow, would that go to acquit him for having called me a ſcoundrel or a rogue? Can a part proven in this way be ſaid to be a juſtification?

Mr. *Harper.* Was this remark made by judge Chaſe in good humour?

Mr. *Marſhall.* I thought him in a remarkable good humour.

Mr. *Harper.* You ſay judge Chaſe was poſitive. Was he harſh towards the counſel of the traverſer?

Mr. *Marſhall.* I did not think ſo. I remember that he ſaid, his country had made him a judge, and he would be the judge on the buſineſs of that day, and whatever was tranſacted ſhould be under the direction of the court. He ſaid alſo that he was a frail and feeble man, and that it was poſſible he was in an error, in reſpect to the opinion which he entertained of the law. If the gentlemen who diſſented from his opinions would form a bill of exceptions, he would be the firſt man to allow them a writ of error to go into the ſupreme court of the United States, a ſuperior tribunal, and have there his opinions teſted.

Mr. *Harper.* Did the counſel for the traverſer ſtate a caſe on this offer of the judge?

Mr. *Marſhall.* Thoſe were the obſervations of the court, but I do not recollect that the counſel ſaid any thing in reply.

Mr. *Randolph.* You mentioned that no perſon of Mr. Giles's politics was on the jury.; did I underſtand you, when ſpeaking of Mr. John Harvie as being of thoſe politics, as meaning Mr. Harvie of Belvidere?

Mr. *Marſhall.* Yes, ſir.

Mr. *Randolph.* What do you conceive to have been his politics at that time?

Mr. *Marſhall.* I thought, from his opinion on the ſedition law, which I had underſtood was, that it was unconſtitutional, he might have been of the ſame politics as Mr. Giles.

Mr. *Randolph.* What was your opinion of Mr. Radford?

Mr. *Marſhall.* I underſtood his politics to have been of the ſame kind.

Mr. *Randolph.* Did you ever hear that Mr. Marks Vanderval had denied that he was ſummoned on the jury for the trial of Callender?

Mr. *Marſhall.* I have underſtood that he denied ever having been ſummoned.

Mr. *Randolph.* Did Mr. Harvie anſwer to his name when called on the jury liſt?

Mr. *Marſhall.* Yes, ſir, and he was excuſed as being high ſheriff of the county of Henrico.

Mr. *Randolph.* Did Mr. Radford anſwer to his name?

Mr. *Marſhall.* I believe not, ſir. Mr. Vanderval I am certain did not.

Mr. *Randolph.* Were you well acquainted at the time with Mr. Radford and Mr. Harvie?

Mr. *Marſhall.* I was with Mr. Harvie, and tolerably well with Mr. Radford.

Mr. *Randolph.* Were you well acquainted with Mr. Marks Vanderval?

Mr. *Marſhall.* Not very intimately.

Mr. *Randolph.* Do you know, or believe, that at the election for members of the Houſe of Repreſentatives in the ſpring of the year 1799, whether Mr. Vanderval did vote for your brother, the preſent chief juſtice?

Mr. *Marſhall.* I believe he did not vote at all, but if he had voted, I believe it would have been for him.

Mr. *Harper.* Colonel Tinſley appears upon this pannel, I would aſk you if his political opinions were at that time the ſame as they are now?

Mr. *Marſhall.* I do not know what were his political ſentiments at the time; but I remember that he had been hoſtile to the adoption of the federal conſtitution.

Mr. *Martin.* The pannel of the petit jury is never returned, if I underſtood you right, by the marſhal, until the jury appears in court, and the clerk of the court knows nothing

of it. Did you learn any thing of the pannel that had been ſummoned by the marſhal on the morning you were with him at judge Chaſe's lodgings?

Mr. *Marſhall.* I did not.

The *Preſident.* Did you know whether Mr. D. Randolph had or had not made out his pannel?

Mr. *Marſhall.* I knew nothing of it.

Mr. *Wright.* When was it that the converſation took place at judge Chaſe's lodgings, when you met Mr. Heath there?

Mr. *Marſhall.* I do not recollect the preciſe day, but I think it was the 27th or 28th of May.

The court roſe at 3 o'clock.

SATURDAY, *February* 16, 1805.

The court was opened at 10 o'clock.

Present, the Managers, accompanied by the House of Representatives; and

Judge Chase, attended by his counsel.

DAVID M. RANDOLPH *ſworn.*

Mr. *Harper.* Were you marſhal of the United States for the diſtrict of Virginia in 1800?

Anſwer. I was, ſir.

Mr. *Harper.* Did you attend the circuit court held in May of that year, as marſhal?

A. I did, ſir.

Mr. *Harper.* Did you ſummon the pannel of the jury that ſerved on the trial of Callender?

A. I did.

Mr. *Harper.* Had you any converſation with judge Chaſe on the forming that pannel?

A. I had no converſation with him on that ſubject. There was a converſation offered to me by judge Chaſe.

Mr. *Harper.* What was it?

A. The judge recommended to me that I ſhould get perſons generally from the country; repreſented that they ſhould be twenty-five years of age, of fair characters, untainted by party prejudices.

Mr. *Harper.* What were his reaſons for taking them from the country?

A. I do not know.

Mr. *Harper.* If at that period you had been diſpoſed to form a jury of the political opinion of thoſe then in power, would you have taken them from the town or country?

A. I knew very little of the political ſentiments of the citizens. There were, however, in town a great majority of thoſe whoſe politics were called federal.

Mr. *Harper.* Was that the caſe in the country?

A. I cannot ſay. I never meddled with politics in any way except in private converſation. Not attending at public meetings, I had but little acquaintance with the politics of individuals.

Mr. *Harper.* Did you, in forming the pannel, ſummon any perſons you knew to be oppoſed to the then adminiſtration?

A. I believe I did ſeveral. I ſummoned the beſt and faireſt characters, without reſpect to their political opinions. I employed two deputies.

Mr. *Harper.* Did you ſummon colonel Vanderval?

A. I did by my deputy.

Mr. *Harper.* On what day was he ſummoned?

A. I received directions from the bench on Friday, to be prepared with two juries of 24 each on the Monday following.

Mr. *Harper.* When did you proceed to form the jury?

A. I proceeded the moment I was directed. I ſummoned ſeveral in perſon while in court.

Mr. *Harper.* When did you complete the pannel?

A. I completed it on Monday morning following while the court was ſitting.

Mr. *Harper.* Did you complete the pannel before?

A. Never. It might have been conſidered as in an incomplete ſtate at that period.

Mr. *Harper.* Why ſo?

A. It is never the practice in Virginia for the jury ſummoned to conſiſt of any preciſe number of perſons.

Mr. *Harper.* Did you ever ſhew the pannel to judge Chaſe?

A. Never at any time or place. The liſt was handed to the clerk of the court on Monday after the court was in ſeſſion.

Mr. *Harper.* Did Mr. Chaſe ever ſay any thing to you

about ſtriking off any perſons, of any particular deſcription, from the pannel?

A. Never at any time or any place, I am very confident.

Mr. *Harper.* You are very confident of that?

A. Perfectly ſo.

Mr. *Harper.* You ſay the pannel was not compleated till Monday?

A. It was not finiſhed till that day when the court was in ſeſſion—and the liſt was never ſhewn by me to any perſon.

Mr. *Harper.* It was not the practice then to preſent a liſt to the clerk?

A. Never, except as the jurors are ſworn.

Mr. *Harper.* Were the jurors called and ſworn on that day?

A. There were twelve of them ſworn on that day.

Mr. *Harper.* Did any gentlemen ſummoned apply to you to be diſcharged?

A. Several. At the moment I received orders to have two juries ready by Monday, I called on my two deputies, and deſired them to take down on diſtinct papers the names I mentioned to them. I obſerved that I choſe to take the reſponſibility on myſelf. While they were taking down the names, I ſummoned ſeveral perſons whoſe names were not put down till Monday. On Monday finding my two deputies had not ſummoned a ſufficient number, I went in queſt of them. I found them at the end of the town in the act of executing my orders. Mr. Moſeby, one of my deputies, was ſtanding with colonel Vanderval, I think in converſation with him. I called him acroſs the ſtreet, and aſked him how they ſucceeded. At this time I ſaw my other deputy. They told me they wanted but one or two jurors. I told them they muſt make haſte. About this time I ſaw Mr. Baſſet entering town on horſe-back. I told him that he had been croſſed as a grand juror for non-attendance—that he muſt ſerve as a petit juror, which would give him an opportunity of offering his apology. I took out my watch, and told him that I allowed him five minutes. We arrived at the capitol, and my deputies there gave me their memorandums, from which, and my own, I made up the liſt of the jury. Two gentlemen, Mr. Lewis and Mr. Blakely, offered ſomething like excuſes. I looked at Mr. Blakely and ſaid there was only one excuſe that I would

admit, to wit: his being under 25 years of age. He ſaid he was under that age, and I diſmiſſed him. Mr. Lewis ſaid he might make the ſame excuſe. I ſaid I doubted it, but I let him off. As I went into the paſſage, I met Mr. Samuel Myers, who alſo deſired to be let off. I told him I could not and would not. He ſaid I would excuſe him for a reaſon which he could aſſign. He whiſpered, and ſaid that he was prejudiced againſt Callender. I permitted him to go, but begged him to keep that reaſon to himſelf. Another juror ſummoned, was very warm and importunate to be excuſed. I told him there was only one ground on which I would excuſe him. He aſked me what it was? I anſwered that if it applied to him, he already knew it. I begged him to go to the court, and he would learn what it was. He did ſo.—Colonel Harvie ſtopped me in the paſſage in a haſty manner, and with great warmth and friendlineſs urged me to let him off. He ſaid he was ſheriff of Henrico county. I ſaid I knew it, but that I alſo knew that his duties were generally performed by deputies. I did not let him off. He applied to the court, and was excuſed.

Mr. *Harper*. Were there any other gentlemen who applied to be excuſed?

A. Yes, ſir, Mr. Radford. He was in court at the time I commenced making out the liſt. He urged as an objection to ſerving that he differed in politics from myſelf. This I conſidered evaſive, and I told him I ſhould call him. When called he did not anſwer. I believe he went immediately home.

Mr. *Harper*. Did you go in perſon to execute the proceſs againſt Callender?

A. I did.

Mr. *Harper*. Did you meet any perſon at Peterſburg, with whom you had a converſation reſpecting the arreſt of Callender?

A. The firſt perſon I had any converſation with was Mr. George Hay.

Mr. *Harper*. Did any thing paſs in that converſation tending to diſſuade you from ſearching for Callender?

A. I had fruitleſsly gone in purſuit of Callender ſome diſtance from Peterſburg: on my return about ſunſet, at a tavern nearly oppoſite the reſidence of Mr. Hay, he came up, and entered into converſation with me with regard to Callen-

der. I ſaid I had been on a wild gooſe chaſe, and had found myſelf foiled; but that I was determined to find whether he was not in town. Mr. Hay appeared to intereſt himſelf very much, in diſſuading me from the purſuit. He ſaid that Callender would not be taken, and that it was in vain to purſue him. I replied, that I would do my duty, and, if poſſible, apprehend him. I aſked him if he knew where Callender was. He ſaid he knew not where he was, and if he did, he would not tell me. He invited me to take a bed at his houſe; which I declined, as I was going to ſpend the evening down town.

Mr. *Harper.* Did Mr. Hay aſſign any reaſons why Callender ought not to be arreſted?

A. I cannot ſtate the language he uſed. He urged a great many things. Among others, he obſerved that as Callender could not be defended this term, he would be found guilty and impriſoned, and ſaid that if he was not then arreſted, he might in the fall ſurrender himſelf.

Mr. *Harper.* You underſtood Mr. Hay to ſay, that if Callender was not arreſted till the next term, he would ſurrender himſelf?

A. He ſo intimated to me. Theſe were not his very words, but that was my underſtanding of them.

Mr. *Harper.* You ſay you completed the pannel after the court met on Monday.

A. I did.

Mr. *Harper.* And that you never ſubmitted it to judge Chaſe, or ſpoke to him about it?

A. I did not at any time or place whatever.

Mr. *Harper.* And that you had no converſation with the judge about forming it, except that you have mentioned?

A. None other, and that was at his lodgings in a familiar converſation.

Mr. *Randolph.* I underſtand you to have ſaid you did not ſummon Marks Vanderval yourſelf?

A. I ſaid ſo—but he was ſummoned by my order.

Mr. *Randolph.* Were you preſent when the order was executed.

A. I was on the oppoſite ſide of the ſtreet, and ſaw my deputy Moſeby in converſation with him. He croſſed the ſtreet, and ſaid that colonel Vanderval expreſſed a repugnance to ſerving. I told him it lay with him to releaſe him, and if he departed from the general rule, he muſt anſwer for it.

Mr. *Randolph.* Do you know whether Mr. Vanderval has denied that he was ever ſummoned?

A. I do not, except ſeeing it ſo ſtated in the public papers.

Mr. *Randolph.* Have you ever at any time had any converſation with judge Chaſe on the ſubject of the grand jury?

A. Not that I recollect.

Mr. *Randolph.* Was the William Radford, who was ſummoned and expreſſed his unwillingneſs to ſerve on the jury, the ſame who keeps the Eagle tavern?

A. The ſame.

Mr. *Randolph.* Did he keep the Eagle tavern at that time?

A. I believe not.

Mr. *Randolph.* Did he ſay his politics differed from yours?

A. I do not know that he uſed thoſe words—but ſuch was my impreſſion, at the time, of his meaning.

Mr. *Randolph.* Did you underſtand his opinions to be of that political character?

A. I cannot ſay poſitively. I have ſome indiſtinct recollection that he was claſſed among that deſcription of men.

Mr. *Nicholſon.* What party?

A. The democratic party, as they are called.

Mr. *Randolph.* Did I underſtand you to ſay you were not poſitive to which party he belonged?

A. I was not poſitive at that time.

Mr. *Campbell.* I wiſh you to ſtate when you ſhewed the pannel of the grand jury to the judge?

A. On the firſt day of the court after it was formed.

Mr. *Campbell.* Had he never ſeen it before?

A. Never, ſir—I had never ſeen it before myſelf. The practice is for the returns to be handed in by the deputies, and a liſt formed and given to the clerk, who hands it to the court.

Mr. *Campbell.* Have you any recollection of ſeeing Mr. Heath at the judge's lodgings, and when?

A. I have no recollection of ſeeing him at the judge's chambers at any time, or of ſeeing him in Richmond during that ſeſſion of the court, until it was called to my mind by Mr. Marſhall's teſtimony.

Mr. *Nicholſon.* Then you recollect by preſumption that he was there—did you ſee him?

A. I rather think I ſaw him—but I have no recollection of ſeeing him in judge Chaſe's chamber, or with judge Chaſe alone.

Mr. *Randolph.* Did judge Chaſe lodge at Crouch's—is it not a tavern?

A. It is a boarding houſe, and no wiſe diſtinguiſhed from a tavern. I had never been in the houſe before judge Chaſe's arrival.

Mr. *Randolph.* Did you ever receive any inſtructions verbal, or by letter, from judge Chaſe in relation to the grand jury?

A. Never.

JOHN MARSHALL *ſworn.*

Mr. *Harper.* Pleaſe to inform this honorable court whether you did, or did not, on the part of colonel Harvie, make an application for his diſcharge from the jury; and on what ground that application was made?

Mr. *Marſhall.* I was at the bar, when colonel Harvie, with whom I was intimately acquainted, informed me that he was ſummoned on the jury. Some converſation paſſed, in which he expreſſed his unwillingneſs to ſerve, and ſtated that he was an unfit perſon; for that his mind was completely made up, that he thought the (ſedition) law unconſtitutional, and that whatever the evidence might be, he ſhould find the traverſer not guilty; and requeſted me on that ground to apply to the marſhal for his diſcharge. I told the marſhal that colonel Harvie was extremely deſirous of being diſcharged, and on his diſcovering great repugnance to his diſcharge, I informed him that he was predetermined, and that no teſtimony could alter his opinion. The marſhal ſaid that colonel Harvie might make his excuſe to the court; he obſerved that he was watched, and to prevent any charge of improper conduct from being brought againſt him, he ſhould not interfere in diſcharging any of the jurors who had been ſummoned. I informed col. Harvie of this converſation, and it was then agreed that I ſhould apply to the court for his diſcharge upon the ground of his being ſheriff of Henrico county, that his attendance was neceſſary as that court was then in ſeſſion; I moved the diſcharge of the juror on that ground, and he was diſcharged by the court.

Mr. *Harper.* Did you communicate to judge Chaſe, or to the court, the reaſons which firſt induced colonel Harvie to make this application?

Mr. *Marſhall.* I only ſtated that he was ſheriff of Henrico county, and that it was unuſual to require the attendance of ſheriffs on juries. I believe the marſhal was at that time obtaining jurymen, he had at that time a paper in his hand, and appeared to be ſetting down the names of perſons within his view.

Mr. *Randolph.* Were you in court during a part of the trial, or during the whole of the trial?

Mr. *Marſhall.* I think I was there only during a part of the time.

Mr. *Randolph.* Did you obſerve any thing unuſual in the conduct on the part of the counſel towards the court, or the court towards the counſel, and what?

Mr. *Marſhall.* There were ſeveral circumſtances that took place on that trial, on the part both of the bar and the bench, which do not always occur in trials. I would probably be better able to anſwer the queſtion, if it were made more determinate.

Mr. *Randolph.* Then I will make the queſtion more particular by aſking whether the interruptions of counſel were much more frequent than uſual?

Mr. *Marshall.* The counſel appeared to me to wiſh to bring before the jury arguments to prove that the ſedition law was unconſtitutional, and Mr. Chaſe ſaid that that was not a proper queſtion to go to the jury; and whenever any attempt was made to bring that point before the jury, the counſel for the traverſer were ſtopped. After this there was an argument commenced (I think) by Mr. Hay, but I do not recollect poſitively, to prove to the judge that the opinion which he had given was not correct in point of law, and that the conſtitutionality of the law ought to go before the jury; whatever the argument was which Mr. Hay advanced, there was ſomething in it which judge Chaſe did not believe to be law, and he ſtopped him on that point. Mr. Hay ſtill went on, and made ſome political obſervations, Judge Chaſe ſtopped him again, and the colliſion ended, by Mr. Hay ſitting down, and folding up his papers as if he intended to retire.

Mr. *Randolph.* There were many preliminary queſtions, ſuch as, with reſpect to the continuance of the cauſe, the ad-

miſſibility of teſtimony, &c. Did the interruptions take place on the part of the court only when the counſel preſſed the point of the unconſtitutionality of the ſedition law?

Mr. *Marſhall.* I believe that it was only at thoſe times, but I do not recollect preciſely. I do not remember correctly what paſſed between the bench and bar; but it appeared to me that whenever judge Chaſe thought the counſel incorrect in their points, he immediately told them ſo, and ſtopped them ſhort; but what were the particular expreſſions that he uſed, my recollection is too indiſtinct to enable me to ſtate preciſely; what I do ſtate is merely from a general impreſſion which remains on my mind.

Mr. *Randolph.* Was there any miſunderſtanding between the counſel and the court, and what was the cauſe of that miſunderſtanding, or what was your opinion as to the cauſe, or did you form one?

Mr. *Marſhall.* It is impoſſible for me to aſſign the particular cauſe. It began early in the proceedings and increaſed as the trial progreſſed. On the part of the judge it ſeemed to be a diſguſt with regard to the mode adopted by the traverſer's counſel, at leaſt I ſpeak as to the part which Mr. Hay took on the trial, and it ſeemed to increaſe alſo with him as he went on.

Mr. *Randolph.* When the court decided the point that the jury had not a right to decide upon the conſtitutionality of a law, did the counſel for the traverſer begin an argument to convince judge Chaſe that the opinion which he had delivered on that point was not well founded? Is it the practice in courts when counſel object to the legality of an opinion given by the court, to hear the arguments of counſel againſt ſuch opinion?

Mr. *Marſhall.* If the counſel have not been already heard, it is uſual to hear them, in order that they may change or confirm the opinion of the court, when there is any doubt entertained. There is however no poſitive rule on this ſubject, and the courſe purſued by the court will depend upon circumſtances; where a judge believes that the point is perfectly clear and ſettled, he will ſcarcely permit the queſtion to be agitated. However it is conſidered as decorous on the part of the judge to liſten while the counſel abſtain from urging unimportant arguments.

Mr. *Randolph.* In the circuit courts of the United States, after a court is opened for any diſtrict, is it the practice of

ſuch courts to adjourn over from time to time, in order to hold a court in another diſtrict in the intermediate time, and then to return back; or is not the uniform practice to poſtpone cauſes when they cannot be conveniently tried, to the next term?

Mr. *Marſhall.* I can only ſpeak of courts where I have attended, in which the practice is, that the buſineſs of one term ſhall be gone through as far as poſſible, before any other court is held.

Mr. *Randolph.* Was it ever the practice of any court, in which you have practiced or preſided, to compel counſel to reduce to writing the queſtions which they meant to propound to their witneſſes?

Mr. *Marshall.* It has not been uſual; but in caſes of the kind, the conduct of the court will depend upon circumſtances. If a queſtion relates to a point of law, and is underſtood to be an important queſtion, it might be proper to require that it be reduced to writing. Unleſs there is ſome ſpecial reaſon which appears to the court, or on the requeſt of the adverſe counſel, queſtions are not commonly reduced to writing, but when there is a ſpecial reaſon in the mind of the court, or it is required by the oppoſite counſel, queſtions may be directed to be committed to writing.

Mr. *Randolph.* When theſe queſtions are reduced to writing, it is for a ſpecial reaſon, after the court have heard the queſtion, and not before they have been propounded?

Mr. *Marſhall.* I never knew it requeſted that a queſtion ſhould be reduced to writing in the firſt inſtance in the whole courſe of my practice.

Mr. *Randolph.* I am aware of the delicacy of the queſtion I am about to put, and nothing but duty would induce me to propound it. Did it appear to you, ſir, that during the courſe of the trial, the conduct of judge Chaſe was mild and conciliatory?

Mr. *Marſhall.* Perhaps the queſtion you propound to me would be more correct, if I were aſked what his conduct was during the courſe of the trial; for I feel ſome difficulty in ſtating in a manner ſatisfactory to my own mind, any opinion which I might have formed; but the fact was, that in the progreſs of the trial, there appeared ſome——

Mr. *Cocke,* (a Senator) here interrupted Mr. Marſhall, by obſerving that he thought the queſtion an improper one.

Mr. *Randolph* said he would not press it, if there were any objection to it.

Mr. *Harper*. We, sir, have no objection; we are willing to abide in this trial by the opinion of the chief justice.

Mr. *Randolph*. Did you ever, sir, in a criminal prosecution, know a witness deemed inadmissible, because he could not go a particular length in his testimony—because he could not narrate all the circumstances of the crime charged in an indictment, or in the case of a libel; and could only prove a part of a particular charge, and not the whole of it?

Mr. *Marshall*. I never did hear that objection made by the court except in this particular case.

[Some enquiry was here made relative to the above question put by Mr. Randolph, and objected to by Mr. Cocke, which Mr. R. answered by observing that he withdrew it.]

Mr. *Harper*. Please to inform this honorable court, sir, whether you recollect that judge Chase during any part of the proceedings made an offer to postpone the trial of Callender, and if you do, to what time?

Mr. *Marshall*. I recollect at the time a motion was made for the continuance till the next term, that judge Chase declared, as his opinion, that it ought to be tried at the present term. A good deal of conversation took place on the subject. The counsel for the traverser stated several circumstances in favor of their client, particularly relative to the absence of his witnesses; but the whole terminated at that time by a postponement for a few days; so many days as, I thought at the time, were sufficient for obtaining the witnesses residing in Virginia. I do not now recollect what the time was, nor do I say it was sufficient. I simply recollect that I thought it was. When the cause came on again, there was no proposition that I recollect on the part of the traverser's counsel for a continuance, but a desire was expressed of a postponement for a few hours in order to give their witnesses time to arrive at Richmond, as it was possible they had been impeded by the badness of the roads; a considerable quantity of rain having fallen the preceding day. There was a declaration on the part of the court that they might take until the next day, and they went on to say that they might have a longer time, if they thought it was necessary, but the precise length of time offered I do not recollect; but I do remember that they said the trial must come on before the present term closed.

Mr. *Harper.* Is it the practice of the circuit courts to hold an adjourned court, and is it not in the power of the circuit court to adjourn the jury, and direct them to meet again at ſome ſubſequent time?

Mr. *Marſhall.* That is a queſtion of law I have never turned my mind to.

Mr. *Harper.* Do you know an inſtance in which it has been done?

Mr. *Marshall.* I do not know any inſtance in which it has ever been done.

The Preſident. Do you recollect whether the conduct of the judge on this trial was tyrannical, overbearing, and oppreſſive?

Mr. *Marshall.* I will ſtate the facts. The counſel for the traverſer perſiſted in arguing the queſtion of the conſtitutionality of the ſedition law, in which they were conſtantly repreſſed by judge Chaſe. Judge Chaſe checked Mr. Hay whenever he came to that point, and after having reſiſted repeated checks, Mr. Hay appeared to be determined to abandon the cauſe, when he was deſired by the judge to proceed with his argument, and informed that he ſhould not be interrupted thereafter. If this is not conſidered tyrannical, oppreſſive, and overbearing, I know nothing elſe that was ſo.

Mr. *Randolph.* Was the check given to the traverſer's counſel more than once?

Mr. *Marshall.* There were ſeveral interruptions, as I have ſtated, for whenever the counſel attempted to ſhew the unconſtitutionality of the ſedition law, judge Chaſe obſerved that it was a point which ſhould not go before the jury, and he would not permit a diſcuſſion upon it.

Mr. *Randolph.* Then it was theſe checks that induced the counſel to abandon the cauſe of the traverſer. I underſtood that the counſel were endeavoring to ſhew, without any regard to the jury, that the opinion of the court was incorrect.

Mr. *Marshall.* That was my impreſſion.

Mr. *Randolph.* Is it not uſual when the opinion of the court is not ſolemnly pronounced, to hear counſel?

Mr. *Marshall.* Yes, ſir.

Preſident. Is it uſual for a trial to take place on the ſame term that the preſentment is made?

Mr. *Marshall.* My practice, while I was at the bar, was very limited in criminal caſes, but I believe it is by no means

uſual in Virginia to try a man for an offence at the ſame term at which he is preſented.

Mr. *Randolph.* Did you hear judge Chaſe apply any unuſual epithets; ſuch as young men, or young gentlemen, to the counſel?

Mr. *Marſhall.* I have heard it ſo frequently ſpoken of ſince the trial, that I cannot poſſibly tell whether my recollection of the terms is derived from the expreſſions uſed in court, or from the frequent mention ſince made of them; but I am rather inclined to think that I did hear them from the judge.

Mr. *Randolph.* Are you acquainted with Mr. Wirt; was he a young man at that time; was he ſingle, married, or a widower?

Mr. *Marſhall.* I am pretty well acquainted with him; he is about thirty years of age, and a widower.

Mr. *Randolph.* Do you know Mr. Norborne Nicholas, and Mr. Hay; they practiced with you at the bar; did you obſerve any thing in their conduct that required the interpoſition of the court to check or prevent its conſequences?

Mr. *Lee* objecting to this queſtion——

Mr. *Randolph,* ſaid he would decline putting it.

Mr. *Marſhall* then withdrew.

Mr. *Randolph.* The Managers think themſelves entitled to put to any witneſs, however reſpectable his ſtanding in life, any queſtions which they deem neceſſary to bring out the whole facts.

The *Preſident.* If it is not objected to by the counſel for the reſpondent, nor decided by the court to be irrelevant or improper, the Managers will be gratified by having their queſtions anſwered.

At the inſtance of Mr. *Randolph,* chief juſtice *Marſhall* was again called.

Mr. *Randolph.* Is it the practice of the courts in Virginia to proceed againſt a perſon when indicted for an offence leſs than felony, ſay for a miſdemeanor, by iſſuing a capias in the firſt inſtance?

Mr. *Marſhall.* My practice, I before ſtated, had not taken this courſe; I therefore cannot well ſay what the uſual practice is.

Mr. *Harper.* I will aſk you a queſtion, ſir. When Mr. Hay was interrupted by the court at the commencement of his

argument to ſhew to the jury that they were the judges of the conſtitutionality of the law, was the interruption that took place one which went to the argument, or barely reminding them of ſome erroneous opinion delivered?

Mr. *Marſhall.* I believe it was the latter; though I am not certain.

Mr. *Randolph.* Do you recollect, ſir, whether it was as to the matter, or whether the impreſſion has not been made on your mind by ſome converſations which you have heard ſince?

Mr. *Marſhall.* My impreſſions are, ſir, that Mr. Hay preſſed the matter of the conſtitutionality of the law in the manner I have heretofore ſtated.

EDMUND J. LEE *ſworn.*

Mr. *Harper.* Were you at the circuit court in the ſpring of 1800, held at Richmond, at which judge Chaſe preſided.

Mr. *Lee.* I was not in court when Callender was preſented by the grand jury; but I was when application was made for a continuance, and I remember that judge Chaſe, on an application made for a continuance, on account of the abſence of ſome of the witneſſes, informed the counſel, that he could not continue the cauſe, but if they would fix upon any determinate time, within which they could obtain their witneſſes, without its going over to the next term, the court would poſtpone the trial. Judge Chaſe alſo added that he had no objection to poſtpone it for a fortnight or a month; I am not certain whether he did not ſay he would poſtpone it for a longer time, I do not know but he ſaid for ſix weeks, but he ſaid poſitively he would not poſtpone it to the next term. He added, if the counſel conceived they could obtain the evidence within the time mentioned, they might have it.

Mr. *Nicholſon.* At what ſtage of the buſineſs was this propoſition made?

Mr. *Lee.* I think it was made after the affidavit was read.

Mr. *Nicholſon.* On what day was it made?

Mr. *Lee.* I believe it was the firſt day. I do not recollect when the application for a continuance was firſt made, it poſſibly had been before, but I was not in court.

Mr. *Nicholſon.* There was no ſubſequent application?

Mr. *Lee.* None, ſir.

Mr. *Nicholſon.* How long was it before the jury were ſworn?

Mr. *Lee.* I do not recollect the day of the week on which the jury were ſworn, but I remember the offer was made at the time the application for a continuance was made.

Mr. *Randolph.* Do you recollect whether the court offered to poſtpone the trial until all the witneſſes could be procured, or whether the offer related alone to thoſe who reſided in the ſtate of Virginia?

Mr. *Lee.* I do not recollect whether the court ſaid any thing on that point; but I recollect perfectly that they made the offer to poſtpone the trial for ſome length of time, ſuch as I have juſt mentioned, a fortnight, month, or more.

Mr. *Randolph.* How far did you underſtand that *more* to extend?

Mr. *Lee.* Not beyond ſix weeks.

Mr. *Campbell.* Were the counſel for the traverſer preſent, and did judge Chaſe addreſs himſelf to them?

Mr. *Lee.* The counſel were preſent, and I think the judge did addreſs himſelf to them.

Mr. *Campbell.* What then was their reply?

Mr. *Lee.* I do not recollect, if they did ſay any thing, what they ſaid.

JOHN A. CHEVALIER *ſworn.*

Mr. *Harper.* Were you preſent at the circuit court held at Richmond, in Virginia, in the ſpring of 1800, on the trial of James Thompſon Callender?

Mr. *Chevalier.* I was at Richmond at the time.

Mr. *Harper.* Do you recollect what took place on the trial of Mr. Callender?

Mr. *Chevalier.* I was in the court room ſome few minutes during the trial, but I do not recollect any thing that occurred.

Mr. *Harper.* Why not, ſir?

Mr. *Chevalier.* Becauſe I was too far off to hear any thing which was ſaid, and my mind was otherwiſe occupied.

Mr. *Randolph.* Pray how long have you reſided in the United States?

Mr. *Chevalier.* About 20 years.

Mr. *Randolph.* Have you been much in courts?

Mr. *Chevalier.* I have had very little to do with court buſineſs. I had a ſuit, and it was on that account that I happened to be in court.

Mr. *Randolph.* Do you recollect any thing remarkable in the conduct of the court while you happened to be preſent?

Mr. *Chevalier.* Why, ſir, I recollect Mr. Hay's ſhutting up his books and putting away his papers, and that judge Chaſe ſaid to him, when he obſerved it, ſir, you may go on with your ſpeech as long as you pleaſe, and I ſhall not interrupt you any more.

ROBERT GAMBLE *ſworn.*

Mr. *Harper.* Were you at the circuit court of the United States for the Virginia diſtrict, in the month of May or June 1800, held at Richmond?

Mr. *Gamble.* I was one of the jurors, ſir, and I was in court when a motion was made for continuing the cauſe of Callender to the next term.

Mr. *Harper.* Do you recollect whether an offer was made by the court to poſtpone that cauſe?

Mr. *Gamble.* Yes, ſir, judge Chaſe ſaid he would poſtpone it for a week, a fortnight, a month, or more, and I think he mentioned he would poſtpone it for ſix weeks, or as long as the term would admit, without its going over to the next term.

Mr. *Harper.* Do you recollect what Mr. Baſſet's ſcruples were againſt ſerving on the jury?

Mr. *Gamble.* I recollect that he ſtated to the court that he had ſeen extracts in the newſpapers that were alleged to be taken from the book called the Proſpect Before Us, and upon that circumſtance he had made a declaration that if the extracts were faithfully copied from the work, he was ſatisfied that it would come under the operation of the ſedition law. The judge aſked him whether he had made up and delivered an opinion on the articles contained in the indictment, and he anſwered that he had neither ſeen the indictment, nor heard it read; he therefore could not declare that he had formed any opinion upon it. The judge ſaid in that caſe he was a good juror and muſt be ſworn.

Mr. *Harper.* What was underſtood to have been the ſubject of the indictment?

Mr. *Gamble.* It was pretty well underſtood that the indictment was for libellous matter contained in the book called the Proſpect Before Us. I did not know it myſelf, I was taken that morning to ſerve as a juror, without any previous intimation. I had not ſeen either the book or the extracts alluded to, but I had heard them ſpoken of as being within the ſedition law; yet I ſaid nothing to the court after having heard judge Chaſe declare, that Mr. Baſſet's objection would not excuſe him.

Mr. *Harper.* Did you underſtand that Mr. Baſſet urged it as an objection to ſerve on the jury?

Mr. *Gamble.* No, ſir, he merely ſuggeſted it to the court.

Mr. *Harper.* Then he did not aſk to be excuſed on that account?

Mr. *Gamble.* No, ſir.

Mr. *Randolph.* You ſay that Mr. Baſſet and yourſelf informed the court that you had not made up your mind on the charges in the indictment, becauſe you had not read it, and did not know its contents?

Mr. *Gamble.* I had never read or ſeen the indictment, of courſe I had not made up my mind in reſpect to any thing it contained.

Mr. *Randolph.* Had you made up your mind on the publication of the book called the Proſpect Before Us, from which you believed the charges were extracted?

Mr. *Gamble.* Sir, I never read the "Examiner," that contained thoſe extracts, nor had I then ſeen the book called the Proſpect Before Us, although after the jury retired, in order to determine on our verdict, we were compelled in ſome degree to read it nearly through.

Mr. *Randolph.* What induced you to read the book after you retired?

Mr. *Gamble.* Mr. Baſſet wiſhed it to be read. The whole book conſiſted in defamation of the government.

Mr. *Randolph.* As that book is a lengthy production, ſuppoſe you had read it before inſtead of after the indictment was read, might it not ſo have happened that you might have made up your mind as to the publication, and not as to the indictment?

An objection having been made to this queſtion by Mr. Martin,

Mr. *Randolph* ſaid he would withdraw it, but would aſk the witneſs another queſtion. Do you recollect any thing of an

offer made to poſtpone the trial of Callender on the part of the court?

Mr. *Gamble.* I remember there was a ſhort adjournment of the cauſe in the firſt inſtance, and that an offer was made by the court to poſtpone the trial for a month or more.

Mr. *Randolph.* Do you recollect what that *more* was?

Mr. *Gamble.* I do not recollect.

Mr. *Nicholſon.* Was the offer to poſtpone the cauſe made before the jury was ſworn or after?

Mr. *Gamble.* I do not recollect at what time it was made.

Mr. *Randolph.* Did you underſtand that an objection was to be made againſt you, ſir, as a juror on this trial?

Mr. *Gamble.* I had underſtood that I might be objected to, becauſe I had ſpoken words diſreſpectful of Callender.

Mr. *Randolph.* Was evidence offered to ſhew that you had done ſo?

Mr. *Gamble.* I acknowledged it myſelf, and the judge ſaid, notwithſtanding, I was a good juror.

Mr. *Randolph.* Did you ſpeak diſreſpectfully of Callender, and ſo declare it to the court, and what had you ſaid?

Mr. *Gamble.* I had ſaid that I thought him to be a very unworthy character.

Mr. *Randolph.* How did you underſtand that you were to be objected to?

Mr. *Gamble.* I had heard that Mr. ——— had heard me uſe this expreſſion, and that it was intended to bring him forward as a witneſs to prove the fact; this was on the morning of the day of the trial, and juſt before I was ſworn.

PHILIP GOOCH *ſworn.*

Mr. *Harper.* Pleaſe to inform this honorable court whether you were preſent at the trial of James Thompſon Callender, at a circuit court, holden at Richmond, in the year 1800?

Mr. *Gooch.* I was in court during a part of the time of that trial—I did not get in until the jury were called, and juſt before they were ſworn, I believe I was not preſent at the whole of the trial.

Mr. *Harper.* What was the nature of that trial?

Mr. *Gooch.* I underſtood it to be an indictment for a libel upon the Preſident, under the ſedition law, and I went on

purpoſe from Amherſt county, where I reſide, to be preſent at it.

Mr. *Harper.* What did you obſerve relative to the conduct of the court and counſel on that day? ſtate what happened.

Mr. *Gooch.* When Mr. Baſſet ſuggeſted to the court his wiſh to be informed whether it was their opinion that he was a proper perſon to ſerve on the jury, becauſe he had formed and expreſſed an opinion on the extracts which he had ſeen, and declared that if correctly copied from the work called the Proſpect Before Us, the author was within the pale of the ſedition law; on that ſuggeſtion, I recollect, the court decided, and laid it down as law, that he muſt not only have formed an opinion but delivered it alſo, and the judge gave ſome reaſons why he muſt not only have formed, but delivered an opinion. I think he ſaid that if a notorious murder was committed in the body of a county, which every man believed ought to be puniſhed with death, and had ſo formed his opinion, it would in that caſe be impoſſible to get a jury to try ſuch an offender, if it were an objection, that a man had formed an opinion. I underſtood that he had conſulted judge Griffin on this point. The court was very crowded, but I had obtained a ſituation juſt behind the judges, and had an opportunity of hearing in ſome degree what paſſed between them, though not diſtinctly. Mr. Baſſet was eventually ſworn upon the jury. The cauſe proceeded. Mr. Nelſon (the diſtrict attorney) then opened the caſe. I am unable to detail all his obſervations, nor is it material that I ſhould do ſo; however, he ſaid that the intention of the traverſer was to be underſtood from the matter which had been extracted from the Proſpect Before Us, and laid in the indictment with inuendoes. He examined the witneſſes on the part of the proſecution, but I do not recollect that any queſtion was put on the part of the counſel for the traverſer in objection to the teſtimony; but I remember that when colonel Taylor was called to give teſtimony on the part of the traverſer, the court required his counſel to ſtate what they intended to prove by him, and that judge Chaſe required the queſtions to be reduced to writing; after that was done, I remember that he determined that as this teſtimony did not go to prove the whole of a charge, it ſhould not be received. He turned to judge Griffin, and aſked him if that alſo was his opinion; judge Griffin ſaid it

was. Judge Chaſe added afterwards, in a pleaſant manner, to the counſel for the traverſer, "you ſhow yourſelves to be clever young men, and I believe you know that teſtimony of this kind ought not to be adduced, but perhaps you do it to blind the people and to work up their minds to a ſtate of oppoſition;" he then turned to the attorney for the diſtrict, and ſaid he was preſſed by the counſel to admit the teſtimony of colonel Taylor, and that he wiſhed him to give his conſent that it ſhould be received. The diſtrict attorney told him that he could not; judge Chaſe aſked him a ſecond time to accede to the reception of the teſtimony of colonel Taylor; the diſtrict attorney replied he would not, it being inconſiſtent with his duty.

Mr. Wirt then opened the cauſe on the part of the traverſer; he made ſome alluſion to the court's prohibiting the mode of defence, which the counſel for the traverſer had adopted, but he was interrupted by the court, and was told that the deciſion of the court muſt be binding for the preſent, that if they objected, they might file their bill of error, and it ſhould be allowed.

Mr. Wirt proceeded in the cauſe, and was endeavoring to ſhew that the ſedition law was unconſtitutional; the court interrupted him, and told him that what he had to ſay muſt be addreſſed to the court, but if he was going on that point, he muſt again be informed that the court would not ſuffer it to be urged. Mr. Wirt appeared to be in ſome agitation, but continued his argument, and when he came up to that point a ſecond time, he was again interrupted by the court. Mr. Wirt reſumed his argument, and ſaid he was going on.—Judge Chaſe again interrupted him and ſaid "no, ſir, you are not going on, I am going on; ſit down." I recollect alſo after the judge had made ſome obſervations, Mr. Wirt again proceeded, and having obſerved that as the jury had a right to conſider the law, and as the conſtitution was law, it followed ſyllogiſtically that the jury had a right to decide on the conſtitutionality of a law. Judge Chaſe replied to him, *a non ſequitur*, ſir, and at the ſame time made him a bow. Whether theſe circumſtances took place exactly in the order in which I have mentioned them, I am not poſitive, but I believe they did. Mr. Wirt ſat down, and the judge delivered a lengthy opinion. He ſtated that the counſel muſt argue the law before the court, and not before the jury, for it was not compe-

tent for the jury to decide that point, or that the jury were competent to decide, whether the ſedition law embraced this caſe or not, but that they were not competent to decide whether the ſedition law was conſtitutional or not, and that he would not ſuffer that point to be argued.

Mr. *Harper*. What was the effect produced by the reply of judge Chaſe to Mr. Wirt's ſyllogiſm—*a non ſequitur ?*

Mr. *Gooch*. It appeared to me as if it was intended to excite merriment, and if it was ſo intended, it certainly had that effect, and the ſame appeared to me to be the motive of the judge in adding the word *punctuatim* after the words *verbatim et literatim*. I thought theſe circumſtances were calculated to diſplay his wit. After this, Mr. Hay addreſſed the court on behalf of Callender, and I recollect, he met with ſome interruptions in the courſe of his argument, which ended in his folding up his papers, and moving as if he was about to quit the bar. The judge perceiving it, ſaid to him, ſir, ſince you are ſo captious, you may go on and ſay what you pleaſe, you ſhall not be again interrupted.

Mr. *Harper*. When the judge told Mr. Wirt to ſit down, did you conceive the conduct of the court to be rude, and peremptory, or was there any thing like it in his application of the term "young gentlemen ?"

Mr. *Gooch*. I did not perceive any thing rude or intemperate in his conduct, unleſs it can be inferred from the words themſelves, when he ſaid you ſhow yourſelves clever young gentlemen, but the law is, nevertheleſs, not as you have ſtated it.

Mr. *Harper*. Was this alluſion made to a particular point of law, which had been agitated, or was it general ?

Mr. *Gooch*. I do not know, ſir, to what point of law it applied.

Mr. *Harper*. Did judge Chaſe conſult his brother judge Griffin on the ſeveral deciſions which were made, and did judge Griffin concur in them all ?

Mr. *Gooch*. I think he privately converſed with judge Griffin on all the points which he decided ; I do not mean that he conſulted him at every time at which he ſtopped or interrupted the counſel.

Mr. *Harper*. Pray, did judge Chaſe ſay to Mr. Wirt, ſit down, or pleaſe to take your ſeat, ſir ?

Mr. *Gooch*. I think it was pleaſe to ſit down, ſir. I think on that occaſion the judge was proceeding to deliver

an opinion of the court, and that Mr. Wirt was ſtanding at the time, and that the judge ſpoke with a view of letting him have an opportunity of being eaſy in his ſeat.

DAVID ROBERTSON *ſworn.*

Mr. *Harper.* Did you attend the trial of James Thompſon Callender, at the circuit court of the United States, held in Richmond, Virginia, in May or June, 1800?

Mr. *Robertſon.* I attended during a part of the trial, and I took down what occurred in ſhort hand. I have my original notes with me, as well as a printed copy. I muſt however obſerve that the printed copy does not exactly correſpond with my ſhort hand notes. There are four inſtances of a variation, which I have diſcovered by comparing it recently with my notes. If I may be permitted to have recourſe to thoſe papers, I can give as faithful a narrative, perhaps a more correct one, than when depending altogether on my own recollection. The notes were taken at the time, for my own amuſement, and without an idea of their being made public. However, at the requeſt of ſome of my friends, they were publiſhed I think in July following.

Mr. *Randolph.* We have no objection to take the printed ſtatement as evidence on this occaſion.

Mr. *Robertſon* then read the printed ſtatement.

[As this ſtatement was publiſhed ſoon after the trial, in the newſpapers, and was republiſhed by the committee of enquiry of the Houſe of Repreſentatives, its inſertion on this occaſion has been deemed unneceſſary. The variations in the printed ſtatement from the original notes are entirely verbal.]

Mr. *Randolph.* An obſervation has been made in your depoſition, that judge Chaſe conſulted with his brother judge (Griffin) in the opinions which he gave as the opinions of the court; did you ſee him in the act of conſultation, or did you hear him?

Mr. *Robertſon.* I was too buſily engaged in writing to have leiſure for obſerving the attitudes or motions of the judges on the bench, but I underſtood at the time, and my impreſſion is, that they held thoſe mutual conſultations.

M. *Randolph.* I obſerve in this printed depoſition, that judge Chaſe always ſpeaks in the firſt perſon ſingular, was that his manner of expreſſing himſelf?

Mr. *Robertſon.* He ſpoke in that manner on all thoſe occaſions on which I cited him.

Mr. *Randolph.* How long, ſir, have you been in the practice of the law in Virginia?

Mr. *Robertſon.* I have been a practitioner of the law for 17 or 18 years in Virginia. I have been a practitioner on the part of the public for ſeveral years. I am now a practitioner in two diſtricts, having criminal juriſdiction, as public proſecutor. I have been twelve years employed in the one, and ever ſince the year 1788 employed in the other.

Mr. *Randolph.* What is the mode of proceeding in criminal caſes leſs than capital; I mean leſs than felonies, ſuch as miſdemeanors, aſſaults and batteries, &c?

Mr. *Robertſon.* I will explain, ſir. Miſdemeanors, (ſhort of felony) ſuch as aſſaults and batteries, are the only offences in which it is the practice to iſſue a ſummons, and upon the return of the ſummons, if the party does not appear, a capias is directed to be iſſued by the court; but I never knew, in offences of that nature, that a capias was ever iſſued in the firſt inſtance. When I ſay, I do not recollect a capias to have iſſued in the firſt inſtance, I mean to be underſtood as ſaying, that I never knew it to be iſſued, although there are two caſes within my knowledge in which offenders, for crimes leſs than felony, were indicted and tried at the ſame term. The one was a conſpiracy to poiſon, and the perſon was bound, under recognizance, to attend at the court which was then ſitting. Bail was given in a conſiderable ſum, the trial came on ſhortly after, and a ſentence of fine and three years impriſonment was pronounced. The other was a conſpiracy to ſet fire to the town of Peterſburg. It was examined in the county court, and ſent to the court above, the diſtrict court. There they obtained a new indictment againſt the priſoner, and upon that indictment, which was tried at the ſame term, the perſon was found guilty, and ſentenced alſo to fine and impriſonment. It was from the heinouſneſs of theſe offences, I think, that bail was required.

Mr. *Randolph.* Then in caſes of miſdemeanor, not ſo heinous as to poiſon a perſon, or to burn a town, I underſtand it is your practice, under the laws of Virginia, to iſſue a ſummons?

Mr. *Robertſon.* Yes, ſir.

Mr. *Randolph.* Well, ſir, at what time is your ſummons made returnable?

Mr. *Robertſon.* Always to the next term.

Mr. *Randolph.* Does the trial take place at the next term, ſir.

Mr. *Robertſon.* If the party appears he pleads, and the trial goes off until the next term; if he does not appear, a capias may be awarded, and he is brought in to anſwer at the next term.

Mr. *Randolph.* Did you ever know a capias to iſſue in the firſt inſtance for a miſdemeanor, and the party ruled to trial at the firſt court at which he was preſented?

Mr. *Robertſon.* No, ſir, not in caſes of that ſort which I have deſcribed.

Mr. *Randolph.* Did you ever aſk a man to be ruled to trial for a miſdemeanor at the firſt term?

Mr. *Robertſon.* I never did, ſir, if I underſtand your queſtion.

Mr. *Randolph.* Did you ever hear of an offer made by the court to poſtpone the trial of Callender?

Mr. *Robertſon.* I have heard of it out of doors, but I have ſtated that I was not preſent the firſt day, it was only the two laſt days that I was there.

To an interrogatory,

Mr. *Robertſon* anſwered. In all thoſe caſes of miſdemeanor to which I have alluded, the puniſhment is fine and not impriſonment.

The *Preſident.* When the party comes in on a ſummons, and the trial does not proceed, is bail required for his further appearance?

Mr. *Robertſon.* I never knew an inſtance unleſs it was in a flagitious caſe. In one of thoſe which I have mentioned, the party was impriſoned, and it was conſidered as a favor to him, to bring on the trial in order to avoid the impriſonment which muſt have taken place till the next term. It was however conſidered within the power of the court either to poſtpone the cauſe or to bring it on, but I felt it a duty on my part, as public proſecutor, to urge it forward; but I have always thought it in the power of the court, in caſes of high miſdemeanor or flagitious offences, that the party might not eſcape the puniſhment of the law upon conviction, to iſſue a capias and require bail.

Mr. *Randolph.* The 83d chapter of the reviſed code of Virginia has this clauſe reſpecting the mode of proceeding upon preſentment. (Mr. R. here read the paſſage.)

Mr. *Robertſon.* That is one law on this point: but there is another reſpecting proceedings upon information, which I will turn to if indulged with the volume. The book being handed to him—after ſome time he diſcovered and read ſome paſſages from the 24th, 25th, 26th, and 28th ſections, page 305, directing the mode of proceeding on informations.

Mr. *Campbell.* In the two caſes which you have mentioned in reſpect to arſon and poiſoning, was there an application made for the continuance of either of them?

Mr. *Robertſon.* I do not recollect that there was; I believe there was not.

Mr. *Nicholſon.* Were they proceeded againſt by indictment or information?

Mr. *Robertſon.* One by information, the other upon indictment. In one caſe it was impoſſible to obtain an acquittal, becauſe the facts and the law came up to a conviction, and that notoriouſly; but in both caſes, if they had been continued, the impriſonment would have been for ſix months longer, the period of the court being half yearly. As the accuſed could not procure bail, they would have been confined for ſix months longer than the period for which they were condemned.

Mr. *Hopkinſon.* Then if I underſtand you right, ſir, you would have kept thoſe perſons in priſon, till next term, if they could not furniſh bail?

Mr. *Robertſon.* Yes, ſir.

MONDAY, *February* 18, 1805.

The court was opened at 10 A. M.

Present, the Managers, attended by the House of Representatives in committee of the whole: and

Judge Chase, attended by his counsel.

WILLIAM MARSHALL *called in.*

Mr. *Randolph.* Have you not been clerk of the federal court ever ſince its eſtabliſhment?

A. Yes, ſir.

Mr. *Randolph.* Have you ever known an inſtance of the circuit court adjourning from one time to another, and in the interim holding another court?

A. I knew it once to adjourn from Tueſday to Friday. I have never known it hold another court in the interim.

Mr. *Randolph.* Was that in relation to a particular caſe?

A. Yes, ſir. The adjournment took place to give the gentlemen of the bar an opportunity of qualifying in the ſuperior court.

Mr. *Harper.* We have heard in this caſe much about political opinions, and of the effects they were intended to have on the trial of Callender. What was the political character of Mr. Nelſon, diſtrict attorney, at that time?

A. I conſidered his politics as violently oppoſed to the then adminiſtration of the general government.

Mr. *Harper.* Was he in ſtrong and decided oppoſition to it?

A. He was at that time.

Mr. *Harper.* Do you know any inſtances that occurred before judge Chaſe went to Richmond, of a deciſion in the circuit court that the ſtate law of Virginia reſpecting the aſſeſſing the fine by the jury did not apply in that court, and what were they?

A. There had been two inſtances of indictment in the circuit court at Richmond. In one caſe judge Iredell preſided, and in the other judge Wilſon. In both it was decided that the jury ſhould not aſſeſs the fine, but the court. The indictment in one caſe was quaſhed; and in the other the judgment was arreſted, ſo that the deciſions were not final.

Mr. *Nicholſon.* In what manner did the court decide that the jury ſhould not aſſeſs the fine?

A. In one caſe the jury was about to be ſworn—when the court ſaid they would certainly aſſeſs the fine.

Mr. *Nicholſon.* Was any queſtion made of the right of the jury to aſſeſs the fine?

A. It was mentioned; but was not, I think, diſcuſſed.

To an interrogatory put,

Mr. *Marſhall* anſwered—that he knew a caſe in which a capias iſſued; it was a caſe in which a felon was reſcued from the civil authority.

Mr. *Martin.* Was he tried the ſame term he was arreſted?

A. Not in that caſe; but I have known repeated trials the ſame term; and in ſome inſtances trials have been had the ſame day the indictment was found.

Mr. *Randolph.* Have you known motions to be made for a continuance, and what was the deciſion?

A. I have generally agreed to them; but not as a matter of right.

Mr. *Nicholſon.* In what courts were you public proſecutor?

A. In the court of Huſtings for the city of Richmond.

Mr. *Nicholſon.* Was that court created by a law of the corporation?

A. No, ſir, by an act of the aſſembly.

Mr. *Nicholſon.* You ſtated that in going to judge Chaſe's lodgings you met Mr. Heath, I think in the paſſage?

A. I ſtated that I was uncertain whether I met him within or without the houſe.

Mr. *Nicholſon.* Are you rather inclined to think that you met him in the paſſage?

A. I cannot ſpeak with certainty.

Mr. *Nicholſon.* How is the door of judge Chaſe's chamber ſituated as to the other parts of the houſe?

A. As well as I recollect there is but one door in a narrow paſſage leading to judge Chaſe's room.

Mr. *Nicholſon.* Are there other doors leading to the paſſage?

A. I believe there are; but I am not certain, as I have not been at the houſe ſince judge Chaſe lodged there, and had not been there before.

Mr. *Clark.* Did I underſtand you to ſay that miſdemeanors are tried on the ſame term that the indictment is found?

A. Yes, ſir.

Mr. *Clark.* How was the defendant got into court?

A. He was bound in a recognizance.

Mr. *Randolph.* Was it at Crouch's tavern that judge Chaſe lodged?

A. I do not know where he lodged. His ſitting room was in the upper end of the houſe.

Mr. *Randolph.* The houſe ſtands on the ſide of a hill, and may be ſaid to have two ground floors; was his room on the upper or lower floor?

A. He ſat in a room on the upper floor.

Mr. *Harper.* Do you recollect inſtances of motions for poſtponement which you oppoſed?

A. Yes, ſir. I recollect one ſuch inſtance in which a man was charged with receiving a hogſhead of tobacco, and was impriſoned ſix months and fined one hundred dollars.

Preſident. I underſtand that you were proſecutor for the commonwealth of Virginia?

A. I was, ſir. I was appointed to proſecute for Richmond, while colonel Innes was attorney general. I applied to him, and to his ſucceſſor, Mr. Brooks, for information as to the practice; but I could never find that there was a fixed practice. I therefore acted according to my beſt judgment.

Mr. *Harper* ſaid that before he proceeded in the examination of other witneſſes he would correct a miſapprehenſion which had ariſen with regard to the teſtimony of Mr. D. M. Randolph. For the purpoſe of correcting it he would read a letter he had juſt received from that gentleman.

[Mr. *Harper* here read the letter to ſhew that though Mr. Hay had in converſation with Mr. Randolph ſtated his opinion that it would be either impoſſible, or extremely difficult to find Callender, and his belief that he would ſurrender next term, yet it was not the impreſſion of Mr. Randolph that this was done to influence him in the diſcharge of his official duty.]

Mr. *Nicholſon* obſerved that he wiſhed, at this ſtage of the trial, to ſuggeſt a queſtion which had ariſen in his mind. Some of the witneſſes on the part of the proſecution were abſent. He did not know whether the court conſidered itſelf authorized to iſſue attachments for abſent witneſſes. There were ſome witneſſes abſent whoſe teſtimony the managers were extremely anxious to obtain. If the court deemed itſelf authorized to iſſue attachments, he would make a motion to that effect.

Preſident. The court cannot take order on hypothetical caſes. If any witneſſes ſummoned have diſobeyed the orders of the court, the court will take proper order for ſecuring their attendance on a propoſition being made to that effect.

Mr. *Harper.* I will proceed to ſhew the practice of the circuit court in the ſtate of Maryland, where judge Chaſe reſides, and alſo in Delaware. It has been a common practice in Maryland ever ſince the federal courts were organized, to adjourn, whenever a neceſſity for it appeared to the court to exiſt. In the ſtate of Maryland there is no limitation to the ſeſſion of the ſtate courts.

JAMES WINCHESTER *called in.*

Mr. *Harper.* Do you at an adjourned court try cauſes?

A. No doubt. We progreſs with cauſes at an adjourned court, in the ſame manner as at an original court.

Mr. *Harper.* Do you not try criminal as well as civil actions?

A. I do not recollect any inſtances of criminal caſes. We have very few inſtances of criminal caſes in the circuit court.

Mr. *Harper.* Has this practice exiſted as long as the court has exiſted?

A. It has been the conſtant practice ever ſince I was on the bench. A poſtponement often takes place for the convenience of the bar—to allow time for making up the iſſues, which cannot be done during the hurry of buſineſs.

Mr. *Harper.* Has judge Chaſe ever adjourned the circuit court for Baltimore, and after holding a court in Delaware, opened the adjourned court at Baltimore?

A. I do not recollect. I think there was one caſe of an adjournment, during the interval of which he went to Delaware.

Mr. *Key.* The circuit meets at Baltimore on the firſt Monday of May, and the general court of Maryland at Annapolis on the firſt Tueſday of the ſame month. Do you recollect an inſtance of the circuit court adjourning the firſt week in May to September, and that a circuit court was in the mean time held by judge Chaſe in Delaware?

A. I do not recollect this preciſely. But I recollect the circuit court having adjourned from May to September; and I believe judge Chaſe held a court in Delaware in the mean time.

Mr. *Randolph.* Have you ever known any other judge to make a ſimilar adjournment?

A. I do not recollect. There is very little buſineſs in the circuit court, and generally all the buſineſs is tranſacted without a neceſſity for an adjournment.

Mr. *Key.* It has been the invariable practice of the circuit court to adjourn to intervening periods between the ſtated terms, at the diſcretion of the court—alſo in the ſtate courts?

A. It has.

WILLIAM RAWLE *called.*

Mr. *Harper.* Pleaſe to ſtate what you know of the practice of the circuit court for Pennſylvania as to adjournments and meeting in the intervening time?

A. The firſt time I recollect the ſubject to have been diſcuſſed in the Pennſylvania diſtrict, was when Mr. Jay preſided. On ſome occaſion, which I do not remember, it accorded with the views of the court to adjourn for a few days, or perhaps a week. At firſt I was inclined to doubt whether this could be done. Mr. Jay and Mr. Peters called upon me to ſtate my ideas, and deſired me to conſider the caſe and look at the acts of Congreſs. The next day I gave it as my opinion that the court had a right to adjourn as the length of their ſeſſion was not limited by law. Mr. Jay and Mr. Peters were of the ſame opinion; but what took place I do not recollect.

I recollect in 1795, at the trials ariſing out of the weſtern inſurrection, many of the trials laſted till 3 or 4 o'clock in the morning, and that in one inſtance the court adjourned from the 16th to the 18th of the month. I recollect another inſtance, when judge Chaſe preſided, where at the inſtance of the bar, an adjournment took place until the firſt Monday in Auguſt, and that the court met that day, and did ſome chancery buſineſs.

Another inſtance in which the queſtion was diſcuſſed was during the trials before judge Iredell ariſing out of the northern inſurrection. Mr. Iredell then thought it the ſafeſt way for him to come to the court at 10 o'clock, and adjourn the court from day to day, ſtating, however, that he did not know that this was neceſſary.

The next inſtance I recollect, was in the year 1804, when judge Waſhington preſided, when, at my inſtance, in conſequence of large bodies of land having been ordered to be ſold, the court adjourned from May to ſome day in July. I do not recollect any other inſtances.

Mr. *Harper.* Do you recollect an adjourned court being contemplated to be held in January?

A. I do. Judge Waſhington agreed with judge Peters, if the yellow fever ſhould occur at the uſual time of holding the court, that the latter ſhould open and adjourn the court. But the calamity not occurring that year, there was no neceſſity for the adjournment.

Mr. *Randolph.* Did not the firſt caſe you mentioned ariſe from Mr. Jay having been appointed an envoy extraordinary?

A. I do not recollect.

Mr. *Hopkinſon.* Is it not the invariable practice of the court of common pleas to do every ſpecies of common buſineſs at an adjourned court?

A. Unqueſtionably. The period of the adjourned court is regularly fixed; and all the jury trials take place at an adjourned court.

Mr. *Harper* ſaid that he conſidered it his duty to do juſtice to a gentleman (Mr. Nicholas) to whoſe teſtimony he had alluded in his remarks on opening the defence. He had ſtated that it could be proved, contrary to his teſtimony, that he had himſelf iſſued a capias in a particular caſe. He had ſince inſpected the record, and found that it did not warrant the inference.

Mr. *Harper* then ſaid that to ſhew what was the practice in Virginia he would call Mr. E. Lee.

EDMUND J. LEE *called.*

Mr. *Harper.* Pleaſe to inform the court whether you are acquainted with the criminal practice in any and what parts of Virginia.

A. I have been a practitioner of the law for about nine years. My practice has been confined to the upper court in three counties, and to one diſtrict court. I have never appeared in the character of a public proſecutor; but generally in defence of the accuſed. In the county courts of Virginia, the uſual practice on preſentments for offences not capital, and not proſecuted by way of indictment, is to iſſue a ſummons. There are ſome offences, which according to the laws of Virginia, are tried ſolely by the court without the intervention of a jury: ſuch as neglect of duty on the highway, profane ſwearing, ſabbath breaking. When the grand jury preſent offences of this ſort, the penalty attached to a number of which does not exceed five dollars, a ſummons iſſues againſt the party to appear at the next court, and on his appearance the court examine him and proceed to judgment.

There are alſo ſome offences which may be proſecuted before the diſtrict court, when the penalty does not exceed ——. In theſe caſes the court alſo proceeds to judgment without the intervention of a jury.

There are other offences ſolely proſecuted by way of information. On a preſentment by a grand jury, a ſummons iſſues,

But in the courts in which I have practiſed, I have never known a ſummons againſt a perſon to anſwer an indictment for any offence. The practice in the courts in which I have had occaſion to attend is this; when the party is proceeded againſt by indictment, the attorney for the ſtate ſends the indictment to the ſame grand jury that found the preſentment—they return it a true bill; and a capias is then iſſued.

Mr. *Harper.* Then the diſtinction is between indictable offences, and thoſe founded on preſentment or information.

A. Yes, ſir.

Mr. *Harper.* I underſtand you to ſay that it is the practice to iſſue a capias in caſes as low as aſſault and battery.

A. In the county courts.

Mr. *Harper.* Do you recollect a queſtion lately made under the law of Virginia in the diſtrict of Columbia?

A. Yes, ſir. In the diſtrict court for Alexandria it has been determined on argument that a capias is the proper proceſs on all indictments; and Mr. Maſon, who has for ſome years proſecuted on the part of the United States has in all caſes for aſſault and battery iſſued a capias.

Mr. *Harper.* And this under the law of Virginia?

A. Yes, ſir. The laws of Virginia are by act of Congreſs made the law for Alexandria.

Mr. *Lee.* Is a capias the mode of proceſs for miſdemeanors uſed in Virginia?

A. That is either uſed, or a warrant.

Mr. *Randolph.* I wiſh to know whether it is regular to take the profeſſional opinions of witneſſes?

Preſident. Gentlemen are enquiring into the practice.

Mr. *Lee.* Is not a capias the uſual mode of proceſs for arreſting offenders for miſdemeanors?

A. I never new any other mode.

Mr. *Randolph.* You have mentioned that it is uſual for a capias to iſſue on an indictment. Did you ever know a capias to iſſue on a preſentment?

A. I have not when the puniſhment is only fine.

Mr. *Randolph.* When a capias iſſued in the caſes you have mentioned, when was it returnable?

A. To the next court.

Mr. *Clark.* Where bail is required, is it not the practice to take the engagement of the attorney inſtead of ſecurity?

A. I have never known an inſtance.

Mr. *Randolph.* I think you ſaid you have not been much engaged in this kind of practice?

A. Except in the diſtrict court, and ſome counties of Virginia.

Mr. *Harper.* You have ſtated that in caſes where indictments have been found you have known a capias ordered, but not on a preſentment. Have you ever known a man for an offence of an indictable nature taken on a magiſtrate's warrant, and held to bail?

A. Yes, ſir, in a caſe of aſſault and battery, a magiſtrate brought the man before him, and compelled him to give ſecurity to appear at the next court.

Mr. *Harper.* In caſes of preſentment for indictable offences before the indictment was found, have you ever known a ſummons iſſued?

A. No, I do not recollect an inſtance of any proceſs iſſued before the finding the indictment.

Mr. *Harper.* Suppoſe proceſs ſhould iſſue before, what do you conceive it would be?

A. I do not know.

Mr. *Harper.* I will examine one witneſs more as to this *very variable and doubtful practice.*

PHILIP GOOCH *called.*

Mr. *Gooch* ſaid that he had practiſed thirteen or fourteen years in the diſtrict court of Charlotte, and in the county courts, and obſerved that when the puniſhment was only pecuniary, it was uſual to iſſue a ſummons; and if the party did not appear on the return day, a capias was iſſued. If the caſe were important, the general practice was to apply to a magiſtrate for a warrant, or for the bye-ſtanders to carry the offender before a magiſtrate.

Mr. *Harper.* It is not then an object in your part of the country that offenders ſhould eſcape?

A. No, ſir. A magiſtrate may iſſue his warrant, and apprehend perſons puniſhable for miſdemeanors. I do not recollect any inſtance of the kind on a preſentment. But at the diſtrict court, where judge Tucker preſided, I underſtood that a capias iſſued againſt a perſon for throwing a ſtone at the court.

Mr. *Harper.* Was it on an indictment or preſentment?

A. Neither. It was for a contempt of the court.

Mr. *Harper.* They do then puniſh for contempts in Virginia?

A. Certainly.

Mr. *Harper.* I will aſk you a queſtion relative to another part of this caſe. Have you ever known an inſtance in Virginia in which a queſtion was propoſed to a juror of this kind—"Have you ever formed and delivered an opinion reſpecting the matter in iſſue?"

A. In the county where I reſided, the Britiſh merchants had a great many claims againſt the citizens, called Britiſh debts, ſome of which I was employed to proſecute. It was found that it would be impoſſible to get a jury, if the having formed an opinion was admitted as an excuſe, as every man had formed an opinion. The court determined that unleſs a man had delivered as well as formed an opinion he was a good juror.

Mr. *Harper.* As the Virginia practice is extremely unſettled, I will proceed to ſhew what the practice of Maryland is, in which ſtate judge Chaſe was brought up.

Mr. *Randolph.* I am of opinion that the counſel might as well adduce the law in Turkey. The article only charges the reſpondent with a breach of the Virginia law.

Mr. *Lee.* I hold it as undeniable that when a high officer is brought before this high tribunal, charged with high crimes and miſdemeanors, he may produce evidence from any ſource whatever that reprobates the evil intention wherewith he is charged. When teſtimony is produced by the managers to ſhew what the judge ſaid in the preſence of ſtrangers, jocoſely, and with unſuſpicious freedom, to prove an evil intent, how comes it, when we attempt to ſhew by indiſputable evidence that there was no evil intent, that we are denied the right? This high court, which I have the honor of addreſſing, is, I apprehend, a court of impeachment, and not of errors. When an error is alleged to have been committed by the judge, ſhall we be denied the right of adducing evidence to ſhew, that if it was an error, it was common to the judicial tribunals before he was raiſed to the high place he now holds; that during the whole courſe of his profeſſional career he retained the opinion, now charged as an error; that in all caſes he held and ſupported this opinion, and that he ever acted under the conviction that he was faithfully diſcharging

his duty; that he ſat as a judge in criminal caſes for ſix years; and that it was his uniform practice to have the capias returned to the ſame term on which it iſſued, and that it was his practice to try for offences at the ſame term that they were indicted. Will the court deny this right? If the conduct of the judge ſhall be deemed an error, will not this be conſidered as ſome excuſe?

Mr. *Randolph* ſaid, had he known that his remark would have occaſioned ſo long an argument, he would not have ſaid a word. He was ready to admit as proven that for which the gentlemen meant to produce teſtimony—that the practice was ſuch as they ſtated it to be in Maryland.

Mr. *Key*. I underſtand then that it is admitted to be the univerſal practice in Maryland in criminal caſes, before the indictment is found, to iſſue a capias or bench warrant.

Mr. *Randolph*. I admit it.

Mr. *Key*. And that in all caſes where there is a preſentment, a capias or bench warrant iſſues *inſtanter*.

Mr. *Randolph*. I admit that it is the *general* practice.

Mr. *Key*. That is ſufficient.

Mr. *Martin*. And that it is the general practice to try the firſt term.

Mr. *Nicholſon*. I admit that this is the caſe in capital caſes; but not in lighter caſes, if the party accuſed oppoſe it.

Mr. *Martin*. The reverſe is the caſe. The court will rather avoid preſſing a trial in capital caſes, where the life of the party is involved.

Mr. *Wright* ſaid he wiſhed to put a queſtion to Mr. Martin in his capacity of a witneſs. In what caſes have you ever known a bench warrant to iſſue?

Mr. MARTIN. I have practiced for twenty-ſeven years: and the invariable practice is to iſſue a bench warrant immediately on the preſentment; in all caſes from the loweſt to the higheſt offences.

Preſident. Is there any difference between a capias and a warrant?

Mr. *Martin*. They are the ſame, except that one is iſſued by a magiſtrate, and the other by the court.

Mr. *Lee* here adduced a number of authorities, (the greater part of which he barely referred to,) for the purpoſe of exhibiting fully the grounds of the defence. As theſe were again introduced in the arguments of counſel, we ſhall only,

in this place, refer to them. He referred to the 14th and 34th ſections of the judicial act of the United States; to 2d Dallas, 411—Gilbert's law of evidence, page 307, 308—alſo page 333—2d Dallas 235, 341.

Mr. *Harper* ſaid they would proceed to adduce teſtimony relative to the 7th article.

GUNNING BEDFORD *ſworn.*

Mr. *Harper.* Pleaſe to ſtate to the court whether you were preſent in your judicial character at a circuit court held at Wilmington in 1800, and relate the circumſtances which occurred?

A. I attended that court on the 27th of June. Judge Chaſe preſided. I arrived in the morning about half an hour before judge Chaſe. We went into court about 11 o'clock. The grand jury was called and empannelled. The judge delivered a charge; they retired to their box; after an abſence of not more than an hour they returned to the bar. They were aſked by the judge whether they had any bills or preſentments to make to the court. They ſaid they had none. The court called on the attorney of the diſtrict to ſay whether there was any buſineſs likely to be brought forward. He replied that there was none. Some of the grand jury then expreſſed a wiſh to be diſcharged. Judge Chaſe ſaid it was unuſual for the court to diſcharge the grand jury ſo early in the ſeſſion; it is not the practice in any circuit court in which I have ſat. He turned round to me, and ſald, Mr. Bedford, what is your uſual practice? I ſaid it depended upon circumſtances, and on the buſineſs before the court; that when the court was ſatisfied there was nothing to detain them they were diſcharged. Mr. Chaſe then turned to the jury, and obſerved, "But gentlemen of the jury, I am informed that there is conducted in this ſtate (but I am only *informed*) a ſeditious newſpaper, the editor of which is in the practice of libelling and abuſing the government. His name is ——— but perhaps I may do injuſtice to the man by mentioning his name. Have you, gentlemen of the jury, ever turned your attention to the ſubject." It was anſwered, no. "But, reſumed the judge, it is your duty to attend to things of this kind. I have given you in charge the ſedition act, among other things. If there is any thing in what is ſuggeſted to you, it is your duty to

A. We had two papers printed in Wilmington, one of which was federal, and the other, the Mirror, democratic.

Mr. *Rodney.* Do you recollect whether it is the general practice in Delaware to diſcharge the grand jury the ſame day they are empannelled?

A. I believe it is the general practice.

Mr. *Randolph.* Do you recollect whether the judge, when ſpeaking of the printer, ſaid, "and one of them, if report does not much belie him, is a ſeditious printer and muſt be taken notice of. I conſider it a part of my duty, and it ſhall or muſt be noticed. And it is your duty, Mr. attorney, to examine minutely and unremittingly into affairs of this nature; the times, ſir, require that this ſeditious ſpirit which pervades too many of our preſſes, ſhould be diſcouraged and repreſſed."

A. I have no recollection of ſuch words.

Mr. *Harper.* Do you know who gave the information to judge Chaſe about the printer—was it yourſelf?

A. It was not—I had not the opportunity, as I came to town at a late hour.

NICHOLAS VANDYKE *ſworn.*

Mr. *Harper.* Pleaſe to ſtate whether you were at the circuit court for Delaware in the year 1800?

A. I attended the circuit court held in Newcaſtle on the 27th and 28th June 1800. I was not preſent when the court opened; but I think I entered the court houſe while judge Chaſe was delivering a charge to the grand jury. After its delivery the grand jury retired; they were abſent a ſhort time; and as well as I can recollect before and when they returned, I was either out of the court houſe, or engaged in converſation with ſome perſons out of the bar. I think ſo, as I have no recollection of the queſtion put to the grand jury, whether they had found any bills, and that put to the diſtrict attorney. I entered the bar while there was a pauſe, and ſilence prevailed. I recollect that the firſt circumſtance that attracted my attention was the obſervation of judge Chaſe to the grand jury, that ſince he had come among them, he had been credibly informed that there was a ſeditious printer within the ſtate, in the habit of libelling the government of the United States, and having received this information, he thought it his duty to call the attention of the grand jury

to the ſubject. He appeared to me to be proceeding to ſtate the name of the printer; but he did not name him. He ſaid that might be doing injuſtice to the man, or that it was improper in him. I cannot ſay which was the term he uſed. I think he then aſked the diſtrict attorney if there were not two printers in the ſtate. He anſwered, that there were. There was then ſome converſation between the judge and the diſtrict attorney. My impreſſion was that it conveyed a requeſt from judge Chaſe to the diſtrict attorney to enquire into the ſubject on which he had previouſly ſpoken to the jury. Mr. attorney ſaid that he had not ſeen the papers. The judge aſked him whether he could not procure a file of them. I do not recollect that the name of the printer was mentioned then, or during the whole ſittings of the court. Some perſon at the bar ſaid a file could be procured. Judge Chaſe aſked the attorney, if he could make the enquiry by to-morrow at 10 o'clock. About this time I heard ſome obſervations made reſpecting the diſcharge of the grand jury on that day. Some of the gentlemen ſaid it was a buſy ſeaſon, that they were farmers and were deſirous of returning to their homes. Judge Chaſe replied, that might be very true; but that the buſineſs of the public was alſo important; it muſt be attended to; and therefore he could not diſcharge them. I do not pretend to ſay I have purſued the language uſed. I have only attempted to give my impreſſion of the facts that occurred.

Mr. *Harper*. Did you hear any ſuch phraſe as this—that a ſeditious temper had manifeſted itſelf in the ſtate of Delaware, in Newcaſtle county, and more eſpecially in the town of Wilmington?

A. I do not think I heard ſuch expreſſions.

Mr. *Harper*. What was the manner of judge Chaſe in addreſſing the diſtrict attorney?

A. His uſual manner; which is always warm and earneſt.

Mr. *Harper*. Did he ſay any thing that was authoritative or imperious to the diſtrict attorney?

A. It did not ſtrike me ſo.

Mr. *Harper*. But made a requeſt in the uſual way?

A. Yes, ſir. On the ſecond day a ſhort time after I entered the court, ſome perſon ſpoke to the diſtrict attorney, who ſoon after, as I ſuppoſed, went to the grand jury; in a ſhort time after he returned, and then the grand jury, with a file of papers. The judge enquired of the jury whether they

had any thing to lay before the court. They ſaid they had not. The ſame queſtion was put to the diſtrict attorney, who anſwered there was nothing, unleſs a certain piece againſt judge Chaſe. Judge Chaſe ſaid that was not a proper ſubject of enquiry; it was only matter that tended to libel the government of the United States, that was a proper ſubject of enquiry for the grand jury.

Mr. *Nicholſon.* Is your recollection of what occurred very perfect?

A. I cannot ſay that it is, after ſo long a lapſe of time. I only ſtate my preſent impreſſions of what occurred.

ARCHIBALD HAMILTON *ſworn.*

Mr. *Harper.* Pleaſe to inform the court whether you were preſent at a circuit court for Delaware in 1800?

A. I recollect that I was preſent on the 27th of June. I arrived about ten o'clock, at which time judge Chaſe was not there. Some time after, the court was formed, the grand jury was ſworn, and judge Chaſe delivered a charge. Having retired for about an hour, the grand jury returned to the bar. Judge Chaſe aſked them if they had any bills or preſentments to make. Their reply was that they had not. Judge Chaſe then aſked the attorney of the diſtrict if he had no buſineſs to lay before them. He ſaid he had not. The jury requeſted to be diſcharged. Judge Chaſe ſaid it was not uſual to diſcharge them ſo early, ſome buſineſs might occur during the courſe of the day. He told them, he had been informed that there was a printer who was guilty of libelling the government of the United States—his name is——here he ſtopped, and ſaid, "perhaps I may commit myſelf, and do injuſtice to the man. Have you not two printers?" The attorney ſaid there were. Well, ſaid judge Chaſe, cannot you find a file of the papers of the one I allude to? Mr. Read ſaid he did not take the papers, or that he had not a file. Some perſon then obſerved that a file could be got at Mr. Crows. Judge Chaſe aſked the attorney if he could examine the papers by the next morning. Mr. Read ſaid, that under the directions of the court, he conceived it to be his duty, and he would do it.

On the ſecond day the ſame queſtions, whether they had found any bills, were put to the grand jury. They anſwered that they had not. Mr. Chaſe aſked the attorney of the diſ-

trict if he had found any thing in the papers that required the interpoſition of the jury. He ſaid that he had found nothing which in his opinion came within the ſedition law; but there was a paragraph againſt his honor. Judge Chaſe ſaid that was not what he alluded to. He was abuſed from one end of the continent to the other; but his ſhoulders were broad enough to bear it.

Mr. *Harper*. Did the judge ſay any thing of a ſeditious temper in the ſtate?

A. I do not recollect any ſuch expreſſions.

Mr. *Harper*. Were you in the court the whole time?

A. I was.

Mr. *Harper*. How were you ſituated?

A. I was directly under judge Chaſe, and nothing could fall from him without my hearing it.

Mr. *Rodney*. Do you recollect whether he mentioned the name of the paper?

A. I do not recollect that he did.

Mr. *Rodney*. What was the manner of the judge?

A. I ſaw nothing unuſual.

Mr. *Rodney*. Do you recollect whether his manner made any impreſſion at the bar?

A. On no body but the printer.

Mr. *Rodney*. Do you recollect that the diſtrict attorney ſaid he conceived it his duty to enquire into matter of the kind alluded to?

A. I do.

JOHN HALL *ſworn*.

Mr. *Harper*. Were you preſent at the circuit court for Delaware held in June 1800?

A. I believe I was in court when they met, and when the grand jury were called, and returned into court. I have but a faint recollection of what paſſed between the court and the jury after they returned; I was at a conſiderable diſtance from the court.—I was not preſent the ſecond day.

Mr. *Harper*. Do you recollect what occurred the firſt day, about a printer?

A. I recollect that judge Chaſe ſaid he was credibly informed there was a ſeditious paper publiſhed in the ſtate of Delaware—and he made enquiry of the jury whether any thing

of that nature had come under their notice—They ſaid it had not.

Mr. *Harper*. What did judge Chaſe then ſay?

A. I cannot recollect particularly.

Mr. *Harper*. What did he ſay afterwards?

A. There was ſome converſation between judge Chaſe and the diſtrict attorney. The judge aſked him whether he had ſeen any thing of the kind he had alluded to. He ſaid he had not. The judge aſked him if he could procure a file of the papers.

Mr. *Harper*. Did judge Chaſe ſay any thing about a ſeditious temper in the ſtate of Delaware, or New Caſtle county, or in the town of Wilmington?

A. I do not recollect.

Mr. *Rodney*. Was Mr. Mc Mechon a member of the grand jury?

A. Yes, ſir. He and judge Chaſe went to court together.

GUNNING BEDFORD *called.*

Mr. *Rodney*. Did judge Chaſe, in a converſation with you, ſubſequent to the diſcharge of the grand jury, complain that he could not get a perſon indicted in Delaware for ſedition, though he could in Virginia?

Mr. *Bedford*. I have no diſtinct recollection of that kind. I have ſome indiſtinct recollection that in a ſmall circle of friends, though not to me perſonally, he ſaid ſome ſuch thing in a jocular way.

SAMUEL MOORE *affirmed.*

Mr. *Harper*. Were you in the circuit court held in Delaware in June 1800 when it met?

A. No, ſir. I did not attend early enough on the firſt day to hear the charge given to the grand jury. I think I did not attend before 12 o'clock. I attended as a juror. On the next day I attended early, and was in the court houſe when the court met. When the jury returned into court, enquiry was made whether they had any bills or preſentments to make. They anſwered no. The court then enquired of the attorney of the diſtrict whether he had any buſineſs to lay before the grand jury. He ſaid he had not. While he was making

this reply, he roſe, and laid hold of a file of newſpapers, which I took to be the Mirror of the Times, and while he was in the act of preſenting it, he obſerved that he had not ſeen any thing that in his opinion required notice, unleſs it were a publication reflecting on judge Chaſe, which did not appear to him to come under the ſedition law. Judge Chaſe anſwered, no, ſir; they have abuſed me from one end of the continent to the other; but it is the government, and not myſelf, that I wiſh protected from calumny. Immediately after the grand jury were diſcharged.

Mr. *Harper.* Have you ever ſeen the printed depoſition of Mr. Read on this ſubject? If you are acquainted with any particular circumſtances relative to it pleaſe to ſtate them.

A. I no not know any particular circumſtances reſpecting it.

Mr. *Harper.* I mean to enquire whether there was any conſultation?

A. If you mean a private converſation, it may be improper to ſtate what may be conſidered as confidential.

Mr. *Harper.* I will not then aſk it.

Mr. *Nicholſon.* If theſe queſtions are ſtated with a view to impeach the teſtimony of Mr. Read, I hope they will be put and anſwered.

Mr. *Harper.* I will ſtate the object of the queſtion. It is to diſcredit the teſtimony of Mr. Read by particular circumſtances that occurred in a converſation between the witneſs and him. If the witneſs knows of no ſuch circumſtances I have been miſinformed.

Mr. *Rodney.* Conſcious that nothing which can be ſtated will in the leaſt invalidate the teſtimony of Mr. Read, it is my wiſh, and that of the managers, to allow the fulleſt liberty to the witneſs to ſtate any thing he knows.

Mr. *Moore.* I will anſwer any queſtions put, but unleſs directed I ſhall not conſider it correct to relate a confidential converſation.

Mr. *Harper.* I will wave all further enquiry, if the witneſs deem it indelicate.

Mr. *Moore* intimated that he did ſo deem it.

Mr. *Randolph.* I will aſk the witneſs if he ever had a converſation with Mr. Read on the ſubject.

A. Frequently.

Mr. *Randolph.* I underſtand you to ſay that you do not know any thing that goes to invalidate Mr. Read's teſtimony.

A. Yes sir.

Mr. *Randolph.* That is all we want.

Mr. *Hopkinson* here adduced a charge delivered by chief justice M'Kean in November 1797 in Philadelphia, printed in Claypoole's paper in December 1797 (respecting alleged libellous publications of William Cobbett.)

Mr. *Harper.* We will now adduce testimony relative to the 8th article. But before we call our witnesses, I will ask a question or two of Mr. Montgomery.

Mr. MONTGOMERY *was called.*

Mr. *Harper.* Will you look at that paper. Is it the publication referred to in your testimony as having been sent to the press?

Mr. *Montgomery.* Yes, sir.

Mr. *Harper.* Did you ever send any other publication of the same kind to a newspaper?

A. No, sir.

Mr. *Harper.* I will offer this publication in evidence and I will proceed to read it.

Mr. *Montgomery.* A short time after I returned home, from my recollection at that time, I committed to paper what I conceived to be the substance of the charge delivered by judge Chase, and made my comments upon it. The court will observe that it refers to other conduct of judge Chase in the state of Maryland.

Mr. Harper here read the paper above alluded to from the Baltimore American of the 30th June, 1803, and added, this is the temper of the witness, who has on a previous day given his testimony in this court.

Mr. *Harper.* I will now proceed to show that Mr. Montgomery, in his strong anxiety to get judge Chase impeached, has remembered things which nobody else remembers, and has heard things which nobody else heard.

Mr. *Randolph.* I will ask of this court whether the witnesses we have called are not under their protection?

The *President.* If the counsel, in the testimony they adduce, come up to what they state they can prove, they will not be subject to reproach; if they do not, they merit it.

Mr. *Randolph.* I have no objection to the counsel impugning the veracity of one witness by the evidence of another,

and deſcanting upon it; but I think they take an improper liberty when they undertake to ſay before it is proved, that what is depoſed by a witneſs never paſſed.

The *Preſident.* I underſtand the gentleman to ſay that he will prove by another witneſs, that what has been depoſed never did paſs.

Mr. *Harper.* Preciſely ſo, ſir.

WILLIAM H. WINDER *ſworn.*

Mr. *Harper.* I will aſk you whether you was in the circuit court of the United States held at Baltimore, in May 1803? I will however previouſly obſerve that it is not my intention to ſay or to prove that the witneſs, when he depoſed to certain facts, knew that they had not paſſed. I mean only to impeach his correctneſs, and to infer that as he was angry, he gave to what he heard, the coloring of his own feelings.

Mr. *Winder.* I was preſent at that court when it was opened, and the jury empannelled, and I heard judge Chaſe deliver his charge. After delivering the general and uſual charge to the grand jury, he ſaid he begged leave to detain them a few minutes while he made ſome general reflections on the ſituation of public affairs. He commenced by laying down ſome abſtract opinions, ſtating that that government was the moſt free and happy that was the beſt adminiſtered; that a republic might be in ſlavery, and a monarchy free. He alſo drew ſome diſtinctions with regard to the doctrine of equal rights, and ſaid, that the idea of perfect equality of rights, more particularly ſuch as had been broached in France, was fanciful and untrue, that the only doctrine contended for with propriety was, the equal protection of all claſſes from oppreſſion. He commented on the repeal of the judiciary ſyſtem of the United States, and remarked that it had a tendency to weaken the judiciary, and to render it dependent. He then adverted to the laws of Maryland reſpecting the judiciary as tending to the ſame effect. One was a law for the repeal of the county court ſyſtem. He alſo alluded to the depending law for the abolition of two of the courts of Maryland. He ſaid ſomething of the toil and labor and patriotiſm of thoſe who had raiſed the fair fabric (conſtitution of Maryland) and ſaid that he ſaw with regret ſome of their ſons now employed in deſtroying it. He alſo ſaid that the tendency of

the general ſuffrage law was highly injurious, as under it a man was admitted to full political rights, who might be here to-day, and be gone to-morrow.

This is the amount of my recollection; and I think I have ſtated the language of the judge in as ſtrong terms as he himſelf uſed. Since I was ſummoned as a witneſs I have never ſeen the charge of the judge, or that publiſhed in the National Intelligencer, or by Mr. Montgomery. I concluded that it was moſt proper not to avail myſelf of thoſe publications. My impreſſions, therefore, are altogether unaſſiſted by them.

Mr. *Harper*. Did you attend carefully to the charge?

Anſwer. I did. I am ſure no part of it eſcaped me.

Mr. *Harper*. Did judge Chaſe appear to read it from a paper?

A. I ſo took it. Occaſionally he raiſed his eyes, but not longer than I ſhould imagine a perſon would, who was familiarly acquainted with what he was reading.

Mr. *Harper*. Did you hear him uſe any of thoſe expreſſions depoſed by one of the witneſſes—that the adminiſtration was feeble and inadequate to the diſcharge of its duties, and that their object was to preſerve power unfairly acquired.—Did he uſe any ſuch words?

A. To my beſt belief he did not. I have a ſtrong reaſon for conſidering my recollection on this point correct. Immediately after the charge was delivered I converſed with ſeveral gentlemen reſpecting it. It was complained of as harſh, and as containing reflections on thoſe who had brought about the meaſures alluded to. I reflected on it, and the reſult on my mind was that it was couched in polite terms, and that the reflections it contained were entirely matters of inference.

Mr. *Harper*. Did the judge uſe any arguments againſt pending meaſures?

A. Certainly.

Mr. *Harper*. Did he mention the preſent adminiſtration?

A. I believe not. If he had, it would have ſtruck my mind very forcibly.

Mr. *Harper*. Did he uſe any ſuch phraſe as "degenerate ſons?"

A. I have a particular recollection of that, or ſome ſuch expreſſion. I conſidered it as a very happy alluſion to events which occurred in the ſtate legiſlature.

Mr. *Harper.* You conſidered it as calculated to have a perſuaſive influence?

A. That was not my language. The ſentiment I think was this. He regretted to ſee ſons taking part in deſtroying the fair fabric their fathers had raiſed. He ſpoke feelingly on this point.

Mr. *Harper.* Had you any other converſation which tended to impreſs the ſubſtance of the charge on your memory?

A. I do not recollect. I was very attentive to the charge. I obſerved Mr. S. H. Smith to be preſent; and it was obſerved at the time that we might expect to ſee an accurate ſtatement of the charge from him, as he could detail what he heard with great preciſion. I recollect to have looked at the ſtatement publiſhed in the National Intelligencer at the time it appeared, and I thought it gave a faithful view of the ſubſtance of the charge—quite as ſtrong as the charge itſelf.

Mr. *Nicholſon.* Did judge Chaſe ſay any thing of the motives of the members of the legiſlature of Maryland?

A. He did according to my impreſſion.

Mr. *Nicholſon.* What were the motives he aſcribed to them?

A. As I underſtood him, the motive he aſcribed to them, was to get rid of the judges, and not the ſyſtem.

Mr. *Nicholſon.* He did certainly then allude to the motives of the members of the aſſembly of Maryland?

A. I think he did. If he did not, that was the impreſſion produced on my mind by what he ſaid.

Mr. *Nicholſon.* Do you recollect whether judge Chaſe did at the cloſe of his charge recommend to the members of the grand jury to return home, and prevent certain laws from being paſſed?

A. I think that was the reſult which he drew from what he had previouſly ſaid.

JAMES WINCHESTER *ſworn.*

Mr. *Harper.* Pleaſe, ſir, to ſtate to this court your recollection reſpecting a charge delivered by judge Chaſe in the circuit court of Maryland in May 1803?

Mr. *Wincheſter.* As already ſtated, that court ſat in May 1803, in a room in Evans's tavern. The court and gentlemen of the bar ſat round ſeveral dining tables. I ſat on the left of judge Chaſe; and the jury were on his right. He addreſſed a charge to them, the beginning of which was in the

uſual ſtyle of ſuch addreſſes. He then commenced what has been called the political part of the charge, with ſome general obſervations on the nature of government. He afterwards adverted to two meaſures of the legiſlature of Maryland; the firſt related to an alteration of the conſtitution on the ſubject of ſuffrage; the other contemplated an alteration in the judiciary. He commented on the injurious tendency of the principle of univerſal ſuffrage and deprecated the evil effects it was likely to have. Incidental to theſe remarks, he adverted to the repeal of the judiciary law of the United States. I ſay incidental, for my impreſſion was that his object was to ſhew the dangerous conſequences that would reſult to the people of Maryland from a repeal of their judiciary ſyſtem, and to ſhew that as the act of Congreſs had inflicted a violent blow on the independence of the federal judiciary, it was more neceſſary for the ſtate of Maryland to preſerve their judiciary perfectly independent. I was very attentive to the charge for ſeveral reaſons. I regretted it as imprudent. I felt convinced that it would be complained of; and I am very confident from my recollection, and from the publications reſpecting it, which I afterwards peruſed, that all the political obſervations of the judge related to the ſtate of Maryland.

Mr. *Harper.* Did the judge appear to deliver the charge from a written paper?

A. I have ſat in the circuit court ever ſince 1800—Judge Chaſe has a kind of ſtanding form in his charges on the general ſubject of crimes and offences. When there is much buſineſs expected to be tranſacted he goes into a detailed view of the duties of a grand jury. When there is little buſineſs he contents himſelf with a charge of a different form. When he delivered this charge, he had in his hand a marble covered book.

Mr. *Harper.* (ſhewing him a book.) Do you think this was the book.

Mr. *Winchester.* I believe it was. There were occaſional pauſes during the delivery; he turned backwards and forwards; and read ſections from different parts of the book. At the concluſion of particular ſentences he lengthened out the tones of his voice, and made a pauſe, as if to arreſt the attention of the jury. Though I cannot ſay that there was not a word or expreſſion introduced that was not written,

yet my impreſſion is that he delivered the whole from the book before him.

Mr. *Harper*. Did you hear any expreſſions applied to the preſent adminiſtration, or was the adminiſtration mentioned at all?

A. My impreſſion is very ſtrong that neither the preſent adminiſtration was mentioned, or the views or deſigns of any member of it in any manner whatever. I am confident of this; becauſe if ſuch remarks had been uttered, they would have made a ſtrong impreſſion on my mind.

Mr. *Harper*. Did you ever hear the judge allude to ſuch topics in his charges?

A. I never heard judge Chaſe in any of his charges reflect on any adminiſtration. I have heard a great many charges of his, containing political matter, and they have been all rather calculated to ſupport the exiſting adminiſtration.

Mr. *Harper*. Have you heard any ſince 1800?

A. I recollect no political charge delivered by him ſince that time.

Mr. *Harper*. Was the general tenor of his charges ſince and before 1800 calculated to ſupport the laws?

A. I think there has been this difference. Thoſe delivered before 1800 called on the jury to ſupport the meaſures of the government as wiſe and upright; ſince that period he has made no alluſion to the meaſures of the adminiſtration.

Mr. *Harper*. But his general practice has been to recommend to them the obſervance of law and the ſupport of government?

A. He generally addreſſed the jury on the neceſſity of obeying the laws: that has been the tenor of his charges at all times.

Mr. *Key*. In a criminal caſe, when a queſtion of law ariſes, is not the opinion of the court always taken?

A. Except in a caſe which occurred between the preſent ſecretary of the navy and myſelf [The details of this caſe were not heard] I never knew an inſtance in which the direction of the court was not taken; and I know no inſtance in which counſel attempted to controvert the opinion of the court on a point of law.

Mr. *Key*. Have you ever known counſel addreſs a jury on a point of law after it had been decided by the court?

A. Never.

Mr. *Martin.* Would it not be deemed indecorous to do so?

A. I have always thought so?

Mr. *Nicholson.* I will ask you whether judge Chase recommended to the jury, on their return home, to use their exertions to prevent the adoption of a depending law?

A. I do not know whether the recommendation came from the judge in language and terms. I rather think it flowed as an inference from what he had said.

By a Senator. In any criminal or civil case, did you ever know the court give an opinion without being required by counsel?

A. I recollect no instance, except in a general charge to the grand jury, or in summing up the testimony at the end of the trial.

Mr. *Randolph.* I will ask whether the case you allude to is, after both parties have been heard, at the end of the trial?

A. Certainly, sir.

Mr. *Martin.* I will ask you whether in any case, where the law is settled, and counsel go into an argument on the point of law, the court do not frequently stop them?

A. It is difficult to give a correct answer to this question. It is certain that it often happens, that in arguments on points of law, the court check the counsel, and say they are too clear to be controverted; and, to prevent delay, beg the counsel to pass over them.

TUESDAY, *February* 20, 1805.

The court was opened at 10 a. m.

Present, the Managers, accompanied by the House of Representatives; and

Judge Chase, attended by his counsel.

At the instance of Mr. *Harper*, EDWARD TILGHMAN was called.

Mr. *Harper.* Do you recollect any instance of an adjournment of the circuit courts of the United States?

Mr. *Tilghman.* I recollect in the year 1801, that at a circuit court of the United States, where judges Tilghman, Griffith, and Basset were on the bench, which was held at

Philadelphia, there was an adjournment on the 26th or 27th of October to ſome day early in January enſuing. The court adjourned becauſe they were obliged to hold a court in Bedford, which was in the weſtern diſtrict of Pennſylvania. I recollect that in the court held in Philadelphia, they were not able to go through all the buſineſs before them, particularly in the caſe of Peter Blight's aſſignees. The court conſulted with the bar on the adjournment, and the ſentiment was unanimous that an adjournment could take place. After the court was held in Bedford, it was again held in Philadelphia, in the month of January; the cauſe I have mentioned was tried, and I believe ſeveral others.

Mr. *Harper*. What is the diſtance of Bedford from Philadelphia?

Mr. *Tilghman*. I believe between 100 and 150 miles. In the laſt year in the month of May, while judge Waſhington was holding a court in Philadelphia, he learned that an attempt had been made to ſet fire to his houſe; in conſequence of that circumſtance and the ſituation of his family he was obliged to leave town. He and judge Peters conſulted on the courſe proper to be purſued in caſe the yellow fever ſhould be in Philadelphia at the uſual time at which the court met, and it was agreed that judge Peters ſhould in that caſe open the court and adjourn it over to January. This was agreed after conſulting the bar, and I do not recollect that there was any difference of opinion among them. The court had commenced in April, and this determination was made ſome time in May.

Mr. *Martin*. Did the judges after holding a court at Bedford return to their homes before the adjourned court was held in Philadelphia?

Mr. *Tilghman*. According to my impreſſion they certainly did, there was little or no buſineſs done at Bedford, where they either broke up the day on which they met, or on the day after.

Mr. *Randolph*. Have you ever known of a bill of exceptions in a criminal caſe in the courts of the United States?

Mr. *Tilghman*. Never. I recollect in the caſe of the United States *vs*. Worrell, which was an attempt to corrupt Mr. Tench Coxe, the verdict was againſt the defendant, and there was an arreſt of judgment. There was a diviſion of opinion whether it was an offence at common law, and there was a

talk of a writ of error: it was ſaid at the bar a writ of error would not lie, and I think when it was mentioned to the court, they ſaid the ſame thing under the idea that writs of error were confined to civil caſes.

THOMAS CHASE *ſworn.*

Mr. *Harper.* Pleaſe to look at that paper, (ſhewing a paper.) Do you know the hand writing of it?

Mr. *Chaſe.* I do not.

Mr. *Harper.* Will you look at that book, do you know whoſe hand writing it is?

Mr. *Chaſe.* I do.

Mr. *Harper.* Did you copy it?

Mr. *Chaſe.* I did.

Mr. *Harper.* This is exhibit No. 8, (charge of judge Chaſe,) it contains the whole of the charge; from what page did you copy it?

Mr. *Chaſe.* From page 13 to the words "fathers erected."

Mr. *Harper.* From what did you copy the book?

Mr. *Chaſe.* From a paper in my father's hand writing, except ſome few words interlined by way of correction.

Mr. *Harper.* When did you copy it?

Mr. *Chaſe.* A few days before May term 1803.

Mr. *Martin.* Have you made any alterations in it ſince?

Mr. *Chaſe.* No, ſir.

Mr. *Harper.* We will offer this book in evidence.

PHILIP MOORE *ſworn.*

Mr. *Harper.* Do you know that book? (ſhewing him the ſame book above referred to)

Mr. *Moore.* Judge Chaſe is in the practice of delivering his charges from a book. I ſaw him deliver his charge in May 1803, from a marble covered book, which I believe is the ſame with that book.

Mr. *Harper.* Did he appear to read the whole time he was delivering that charge?

Mr. *Moore.* He appeared to me to do ſo; he occaſionally raiſed his eyes from the paper before him, and ſpoke with more than common emphaſis, but he ſtill appeared to ſpeak from the book.

Mr. *Harper*. Did you hear any thing ſaid by him about the preſent adminiſtration?

Mr. *Moore*. I have never heard the judge in courts of juſtice ſpeak of the preſent adminiſtration.

Mr. *Harper*. Do you think in the charge he ſaid any thing about the adminiſtration?

Mr. *Moore*. I do not.

Mr. *Harper*. Had he made any ſuch remarks, are there any peculiar reaſons why they would have made a ſtrong impreſſion on your mind?

Mr. *Moore*. I think they would have made a ſtrong impreſſion, as my impreſſions were always in favor of the adminiſtration, while judge Chaſe's were againſt them.

Mr. *Randolph*. Was there any recommendation to the jury, when they returned home to uſe their influence to prevent the paſſage of certain laws?

Mr. *Moore*. I do not know that there was, there may have been, but if there was, I have no recollection of it.

WALTER DORSEY *ſworn*.

Mr. *Harper*. Pleaſe to inform the court whether you were at a circuit court held at Baltimore in 1803?

Mr. *Dorſey*. I was.

Mr. *Harper*. Were you preſent when judge Chaſe delivered a charge to the grand jury?

Mr. *Dorſey*. I was.

Mr. *Harper*. Was you in ſuch a ſituation as to hear that charge?

Mr. *Dorſey*. I was.

Mr. *Harper*. Were you near Mr. Montgomery?

Mr. *Dorſey*. I was; I think there was only one perſon between us.

Mr. *Harper*. Did you attend to the charge?

Mr. *Dorſey*. I attended to what is generally called the political part of it, becauſe it was novel, and contained ſpeculations with reſpect to government in general, and remarks on national and ſtate laws.

Mr. *Harper*. Do you recollect any thing in it reſpecting the adminiſtration?

Mr. *Dorſey*. I do not, I recollect a part of it relating to the ſtate and national judiciary, and to univerſal ſuffrage. I

did not heſitate to ſtate that it was an indiſcreet thing; my attention was particularly drawn to it by ſeeing in the room the editor of a newſpaper, and from expecting that it would be the ſubject of newſpaper animadverſion.

Mr. *Harper.* Do you think judge Chaſe made any remarks relative to the preſent adminiſtration?

Mr. *Dorſey.* I do not. I have no diſtinct recollection of any ſuch. I think if he had made ſuch remarks, I ſhould recollect them; there is another circumſtance of which I am not poſitive, whether he did at the end of the charge, recommend to the jury to uſe their exertions to repeal certain laws of the ſtate of Maryland, or whether I drew a conſtruction in my own mind to that effect, from what he ſaid, I cannot ſay, though it is impreſſed on my mind that the former was the caſe.

Mr. *Harper.* Did he appear to read the charge?

Mr. *Dorſey.* He did, he appeared occaſionally to throw his eyes off the paper.

Mr. *Harper.* Did he appear to throw his eyes off for a longer time than is uſual with a perſon who is reading his own compoſition?

Mr. *Dorſey.* No, he did not.

Mr. *Harper.* You are of opinion that he read the whole from a book?

Mr. *Dorſey.* It appeared ſo to me.

JOHN PURVIANCE *ſworn.*

Mr. *Harper.* Pleaſe to inform this honorable court whether you was preſent at a circuit court held at Baltimore in May 1803?

Mr. *Purviance.* I was.

Mr. *Harper.* State what happened on that occaſion.

Mr. *Purviance.* I do not pretend to recollect every thing which occurred; but as I attended to what judge Chaſe ſaid in his charge to the grand jury, I think I have a pretty diſtinct recollection; as to the manner in which he delivered that addreſs, he appeared to me to read the whole from a written paper laying before him; I never expected that this enquiry would have been made of me, and after ſuch a lapſe of time I can only ſpeak of the impreſſions now on my mind.

Mr. *Harper*. Do you recollect whether judge Chaſe made any mention of the preſent federal adminiſtration, and what was it?

Mr. *Purviance*. I have no recollection that he mentioned it, but as it was identified with the repeal of the law for eſtabliſhing the circuit courts of the United States, and ſo far as the executive compoſed a part of the legiſlature he may have mentioned the adminiſtration.

Mr. *Harper*. Was there any particular mention or alluſion to the executive of the United States?

Mr. *Purviance*. No, ſir, nothing of the kind; I have endeavored to retrace in my mind every thing which was ſaid, and I have not the ſmalleſt recollection that any remark was made upon the executive department of the United States.

Mr. *Harper*. Was there nothing ſaid about preſerving power unfairly obtained?

Mr. *Purviance*. I think if ſuch an expreſſion had been uſed, it would have ſtruck me forcibly, for ſhortly after the charge had been delivered, in a converſation among ſome gentlemen on its contents, it was declared that the ſentiments expreſſed by judge Chaſe were impeachable. I thought theſe kind of charges ought not to be delivered from the bench, but I did not obſerve that any thing which had fallen was of a nature to warrant an impeachment.

Mr. *Harper*. Pleaſe to inform this honorable court whether you are accuſtomed to practice law in the courts where judge Chaſe preſides?

Mr. *Purviance*. I am, ſir.

Mr. *Harper*. Is it not his practice frequently to interrupt counſel?

Mr. *Purviance*. I think ſo; but I always attributed it to his quickneſs of apprehenſion, which induced him rather to anticipate counſel than to liſten to them; this I always aſcribed to his ſuperior ſagacity.

Mr. *Harper*. Have you ſeen any difference in his interruptions between counſel with whom he was ſuppoſed to be on ill terms, and thoſe with whom he was on good terms?

Mr. *Purviance*. I never obſerved any difference in his conduct ariſing from a conſideration of perſons, but it always appeared to me to ariſe from the manner in which gentlemen treated the ſubject.

Mr. *Harper*. Were there gentlemen at the bar, with whom judge Chaſe was not on good terms?

Mr. *Purviance.* I think there were.

Mr. *Harper.* Did you ever know judge Chaſe after having decided a point, hear counſel againſt his own opinion, and upon hearing, induced to decide differently?

Mr. *Purviance* ſtated a caſe in which the judge had retracted his opinion upon argument in a caſe in which he had been employed, and added that notwithſtanding the pride of opinion to which men were liable, he had obſerved in judge Chaſe an almoſt unparalleled diſpoſition to hear his opinions conteſted, and when miſtaken to relinquiſh them.

NICHOLAS BRICE *ſworn.*

Mr. *Harper.* Pleaſe to inform this honorable court whether you was at a circuit court held in Baltimore in May 1803, when a charge was delivered by judge Chaſe to the grand jury.

Mr. *Brice.* I was there and attended to the charge very particularly.

Mr. *Harper.* Was that charge ſpoken extempore or was it read from a book?

Mr. *Brice.* I kept my eyes ſteadily upon the judge, and I conceived that he read the whole from a paper, as is cuſtomary with him in delivering a charge to the grand jury.

Mr. *Harper.* Have you a diſtinct recollection of the latter part of the charge?

Mr. *Brice.* I have not a recollection of the words, but I think I recollect their general nature and tendency.

Mr. *Harper.* Did he ſay any thing reſpecting the preſent adminiſtration?

Mr. *Brice.* Not in the ſlighteſt manner, further than mentioning the repeal of the judiciary law of the United States, which he mentioned incidentally in the courſe of his obſervations on the alterations of the judiciary ſyſtem in the ſtate of Maryland. One thing more I will add, with reſpect to the advice which it is alleged he gave to the grand jury: ſhortly after the charge was delivered in talking over this ſubject with Mr. Stephen, I recollect that I rather thought it was an inference drawn from the charge, than any expreſs advice of the court on that point. Indeed I am pretty ſure the words were not uſed.

Mr. *Martin.* Do I underſtand you right? You ſay he had no alluſion to the preſent adminiſtration, but in connec-

tion with the repeal of the law of the United States as it was likely to affect the ſtate of Maryland.

Mr. *Brice.* So far as I recollect he made uſe of no other expreſſion, but mentioned the repeal of that law to ſhew the evil tendency of ſuch meaſures as it regarded the judiciary of Maryland.

JAMES P. BOYD *ſworn.*

Mr. *Harper.* Pleaſe to inform this honorable court whether you were preſent at the circuit court held in Baltimore in May 1803, and what occurred at that time?

Mr. *Boyd.* I was there, but I do not know whether I was there at the opening of the court, but I was there when the charge was delivered to the grand jury. After judge Chaſe had gone through that part of the charge which is an inſtruction to the grand jury relative to the duties of their office, he proceeded to make ſome further obſervations, to which I paid particular attention becauſe they were novel to me. I was under an impreſſion at the time that judge Chaſe was watched.

Mr. *Harper.* Did the judge read the charge from a book?

Mr. *Boyd.* To the beſt of my recollection he did read it, but he caſt his eyes off from time to time in the manner deſcribed by Mr. Montgomery. I thought at the time the political part of the charge would bear hard upon him, becauſe I obſerved Mr. Montgomery paying particular attention to the addreſs of the judge, which was an animadverſion upon the meaſures Mr. Montgomery had been anxious to carry in the legiſlature of Maryland. I do not however recollect the words which were uſed; thoſe who paid it more attention are likely to be more correct.

Mr. *Harper.* Did that charge contain a ſentiment like thoſe you have heard, that the preſent adminiſtration was weak or wicked, &c.?

Mr. *Boyd.* I have not a ſcintilla of recollection of a word of the kind, no further than as an inference to be drawn from what was ſaid in relation to the repeal of the judiciary law. I have however a faint trace of the idea in my mind, not from my own recollection, but from having repeatedly heard it ſtated that there was ſuch a remark made in the charge.

Mr. *Harper.* Have you any reaſon to believe that if ſuch an expreſſion had been uſed it would have ſtruck you ſo forcibly as to enable you now to recollect it, and what is that reaſon?

Mr. *Boyd.* The reaſon is this, I thought a charge of that kind was both imprudent and impolitic; and I have always thought political charges ought not to be delivered from the bench. If judge Chaſe had then dropped a ſentiment ſo improper, reflecting on the preſent adminiſtration of which he formed a part, I ſhould have remarked it in a particular manner. And it is for this reaſon I think he did not uſe it; if he did, it has wholly eſcaped my recollection.

WILLIAM M'MECHIN *ſworn.*

Mr. *Harper.* Inform this honorable court whether you was preſent at the circuit court held at Baltimore in May 1803?

Mr. *M'Mechin.* I was preſent and heard the charge delivered by judge Chaſe to the grand jury.

Mr. *Harper.* Was you in a ſituation to hear the charge diſtinctly, how near was you to the judge?

Mr. *M'Mechin.* I was near the door of the room, about five yards diſtant from the judge. I ſaw the judge delivering the charge, but whether he kept his eyes conſtantly on the book I cannot ſay, as I did not keep my eyes ſteadily upon him; but it appeared to me that he read from the book throughout.

Mr. *Harper.* Have you a recollection of the latter part of that charge?

Mr. *M'Mechin.* I think I have.

Mr. *Harper.* Have you any recollection of his having ſaid any thing againſt the preſent adminiſtration?

Mr. *M'Mechin.* I have no recollection of any thing of the kind, either that they were weak, or of their having unfairly acquired power; ſuch an idea was mentioned in no way unleſs it be inferred from the remark on the repeal of the law eſtabliſhing the ſixteen circuit judges.

Mr. *Harper.* If ſuch a ſentiment had been uttered it would not have eſcaped your notice?

Mr. *M'Mechin.* I think it would not.

Mr. *Harper.* Had you any converſation about this charge, if you had, pleaſe to inform when, with whom, and what was it?

Mr. *M'Mechin.* About five minutes after the charge was delivered I left the court room: going down ſtairs I met Mr. Montgomery and I aſked him, or he aſked me, what was thought of the charge; after a few obſervations, he ſaid it was ſuch an one as Mr. Chaſe would be impeached for; this drew my attention pointedly to the charge itſelf; after this I heard of the publication in the American, but I did not ſee it. I met afterwards with a publication in the Anti Democrat, which paper I took, purporting to be the charge of judge Chaſe. I have converſed with gentlemen of both parties on the publication, and it appeared to them as it did appear to me, and as I ſtill think it is, ſubſtantially the charge delivered by the judge.

Mr. *Harper.* Has that opinion reſted on your mind ever ſince you heard the charge and read the publication?

Mr. *M'Mechin.* It has always ſo reſted on my mind, and I have never read any thing on the ſubject ſince?

WILLIAM S. GOVANE *ſworn.*

Mr. *Harper.* Was you at the circuit court of Baltimore in May 1803?

Mr. *Govane.* I was, and heard the charge delivered by judge Chaſe. The room in which the court was held was a long one in a tavern, a range of tables formed the bar, and the ſeats around it were occupied by profeſſional gentlemen. I went to the bottom of the table oppoſite to judge Chaſe and directed my attention towards him. Whilſt he was delivering his charge he appeared to read it from a book, but generally ended the ſentences by looking toward the grand jury; except this circumſtance he appeared to read the whole time.

Mr. *Harper.* Do you retain a diſtinct recollection of the ſubſtance of what the judge ſaid?

Mr. *Govane.* I think I do.

Mr. *Harper.* Do you remember any part containing animadverſions on the preſent adminiſtration, ſuch as that they were weak, feeble, or incompetent?

Mr. *Govane.* I think no ſuch words were uſed. If I could ſwear to a fact negatively after ſuch a lapſe of time, I could ſwear that no ſuch expreſſions fell from the judge. He ſaid that a monarchy might be free and a republic a tyranny, and then proceeded to define what a free government was.

Mr. *Harper.* Then you have no recollection of any reflection made upon the preſent adminiſtration?

Mr. *Govane.* I have not the moſt diſtant idea that ſuch an expreſſion was uſed.

Mr. *Harper.* Would you have remembered them if they had been uſed?

Mr. *Govane.* I think I ſhould, as I had a converſation with a friend reſpecting it ſoon after it was delivered; and I paid particular attention to the charge, becauſe it came from judge Chaſe, a man of great celebrity, and I wiſhed to draw what information I could from ſuch a reſpectable ſource; every thing arreſted my attention, and it appeared that the attention of the whole company was fixed upon the judge.

JOHN CAMPBELL *ſworn.*

Mr. *Harper,* Did you attend the circuit court held at Baltimore in 1803, and in what capacity?

Mr. *Campbell.* I attended that court as a grand juror and was appointed foreman.

Mr. *Harper.* Do you recollect the charge that was then delivered by judge Chaſe?

Mr. *Campbell.* I recollect ſome parts of it, but not the whole. I paid a particular attention to that part which deſcribed my duties as a grand juror, and have ſome recollection of the latter part. I kept my eyes conſtantly upon the judge.

Mr. *Harper.* Did he read the charge, or ſpeak it extempore?

Mr. *Campbell.* He appeared generally to read it, taking off his eyes from the book from time to time, but never for a longer time than what is uſual for men to expreſs the words they retain in their memory from their own compoſition.

Mr. *Harper.* Have you a diſtinct recollection of the latter part of the charge?

Mr. *Campbell.* I cannot ſay I have a diſtinct recollection of any particular part of the charge, though I remember its general tendency.

Mr. *Harper.* Do you remember to have heard the preſent adminiſtration cenſured as weak, feeble or incompetent, &c.?

Mr. *Campbell.* I have not the ſlighteſt recollection of any ſuch expreſſions, if they were uſed they have altogether eſcaped my memory.

Mr. *Harper.* Was there any alluſion to the preſent adminiſtration?

Mr. *Campbell.* No, ſir.

Mr. *Harper.* If ſuch words were uttered, is there any circumſtance which would have impreſſed them on your memory?

Mr. *Campbell.* I ſhould have thought them very improper, and that would have fixed them in my mind, but I have no trace of any ſuch impreſſion.

Mr. *Nicholſon.* You gave a depoſition before the committee on this point?

Mr. *Campbell.* I did, ſir.

Mr. *Nicholſon.* Did you ſay that the judge recommended to the jury when they returned home, that they ſhould uſe their influence to prevent the paſſage of certain laws then pending before the legiſlature of Maryland?

Mr. *Campbell.* It does appear ſtill to me that I heard ſome ſuch expreſſion. I have thought of it repeatedly ſince, and I continue to believe that the judge gave the jury that advice.

Mr. *Harper.* Was the exhortation made by the judge, or is it an inference you draw in your own mind?

Mr. *Campbell.* Some ſuch expreſſion fell from him, and it is not an inference formed in my mind.

WILLIAM CRANCH *ſworn.*

Mr. *Harper.* Were you preſent at the circuit court held at Baltimore in 1803?

Mr. *Cranch.* I was. The court was held at Evans's tavern in Baltimore; judge Chaſe was ſeated in an armed chair at one end of a long table placed before him; the grand jury were on his right, ſome ſitting on benches placed along the wall and others ſtanding. I ſtood myſelf about fifteen feet from the judge, who was ſitting during the whole time he was delivering his charge: he generally held the book in his hand.

Mr. *Harper.* (ſhewing a book) Is that the book?

Mr. *Cranch.* He appeared to be reading from ſuch a book.

Mr. *Harper.* Did he read the whole, and did he read conſtantly?

Mr. *Cranch.* He appeared to me to read the whole charge, but I did not keep my eyes ſo conſtantly fixed upon him as to declare poſitively that he did.

Mr. *Harper.* Were there variations in his manner of delivering the charge, as if he was at one time reading and at another ſpeaking extempore?

Mr. *Cranch.* He delivered ſome parts with more emphaſis than others. He often raiſed his eyes from the book, but I did not obſerve that he repeated more than one ſentence without recurring to the book: he repeated no more than a man might repeat after running his eyes haſtily over a paſſage.

Mr. *Harper.* Did he raiſe his eyes for a longer time than a man might be ſuppoſed to do, who was reading a compoſition of his own?

Mr. *Cranch.* I do not think he did.

Mr. *Harper.* Do you recollect the latter part of the charge?

Mr. *Cranch.* I recollect more of the latter part than of the beginning, becauſe I paid more attention to the latter part.

Mr. *Harper.* Do you recollect any ſentiments expreſſed relating to the weakneſs of the preſent adminiſtration, and that they were not employed in promoting the public good, but in preſerving ill gotten power?

Mr. *Cranch.* No, ſir, there was no ſuch expreſſion, as I recollect.

Mr. *Harper.* Was there any expreſſion at all relative to the preſent adminiſtration?

Mr. *Cranch.* Not as an adminiſtration; nor any thing alluding to the adminiſtration ſeparate from the government of the United States.

Mr. *Harper.* In what way was the government alluded to?

Mr. *Cranch.* By alluding to the repeal of the act of Feb. 1801, for the eſtabliſhment of the circuit judges. I recollect no other meaſure of the general government which was alluded to, or any alluſion to the preſent executive.

Mr. *Harper.* I will now offer in evidence the book containing the charge of judge Chaſe at Baltimore, which has been proved to be that from which he read his charge; it will be unneceſſary to read it, as it is left on file, and we wiſh to ſave the time of the court.

The written book was then returned to the clerk's table.

Mr. *Harper* ſaid he wiſhed to aſk a queſtion of Mr. M'Mechin.

Mr. M'MECHIN was called, and Mr. Harper enquired if he had rightly underſtood him, when he ſaid that a few mi-

nutes after he had left the court room he met Mr. Montgomery on the ſtairs, and Mr. Montgomery ſtated to him that judge Chaſe would be impeached. Did Mr. Montgomery at that time ſay for what he would be impeached, or that he would be impeached for reflecting upon the adminiſtration?

Mr. *M'Mechin.* He ſaid the judge would be impeached, but I do not recollect that he ſaid any thing about his being impeached for reflections upon the preſent adminiſtration. I thought he felt hurt on the ſubject of the alterations in the judiciary of Maryland, which had been much talked of, and for which he had been an advocate in the ſtate legiſlature.

Mr. *Harper.* In order to ſhew that it is the cuſtom of the courts in this country to deliver political charges to the grand juries (a practice which I am ready to admit is indiſcreet) I wiſh to be indulged in a narration of what has been the practice, and then this honorable court will be convinced that it did not originate with the preſent reſpondent, but that he followed the track which had been a long time marked out. For this purpoſe I will refer to ſeveral tranſactions which have taken place. Firſt in the year 1776, on the 27th April, an addreſs was made to the grand jury in the ſtate of South-Carolina, by William H. Drayton, (1ſt vol. of Ramſay's hiſtory of South-Carolina, page 103.) A further evidence that the cuſtom obtained is derived from the addreſs of the executive council of Pennſylvania, wherein it is recommended that the judges of the ſupreme court make mention in their charges of various ſubjects of a political nature; it is under date of October 8th, 1785. American Muſeum, vol. 1, page 228. I will alſo offer in evidence, a charge delivered by judge Iredell in Pennſylvania, previous to the trial of Fries in 1799. I will adduce that part only which may be denominated political.

I will alſo offer in evidence the general notoriety of the practice in this country for thirty years paſt, to enforce from the bench political principles, and to defend political meaſures; a practice which we contend univerſally prevailed.

I will ſubmit a paper yeſterday referred to as evidence on the 7th article; a charge delivered by chief juſtice M'Kean on the 27th November, 1797. In this charge the learned judge, whoſe eulogium has been ſo boldly pronounced, diſcuſſes the doctrine of libels, and after a variety of pertinent obſervations, goes on as follows:

(Mr. Harper here read extracts from the above charge.)

Exhibit No. 7, contains extracts from the Mirror of the

Times, which are offered for the purpoſe of verifying the ſtatement of the reſpondent; the firſt is contained in the paper of Wedneſday February 5, 1800, and the ſecond in that of February 8th.

Mr. *Randolph.* The exhibits are thoſe which accompanied the reſpondent's anſwer and pleas.

Mr. *Martin.* They are, and we here cloſe our teſtimony, adding only the letter of governor Claiborne, who has acted on the ſame principle, and given to the world his political opinions on various ſubjects.

Mr. *Randolph.* One of our witneſſes has arrived in town, and we wiſh that he ſhould be called.

THOMAS HALL *was called and ſworn.*

Mr. *Nicholſon.* Was you at Baltimore when the charge was delivered by judge Chaſe, and do you recollect the language he made uſe of in addreſſing the grand jury?

Mr. *Hall.* I do not recollect the particular language uſed —I paid very little attention to what was there tranſacted.

Mr. *Nicholſon.* Do you recollect the ſubjects generally, on which he ſpoke?

Mr. *Hall.* I have a general impreſſion, but I cannot be particular.

Mr. *Nicholſon.* Did he mention the preſent adminiſtration as weak and feeble?

Mr. *Hall.* My impreſſion is that he mentioned them, or I inferred it from what was ſaid.

Mr. *Nicholſon.* Did he mention them in ſuch a way as to caſt an odium upon them?

Mr. *Hall.* I could not identify the language of judge Chaſe, even if it were laid before me.

Mr. *Nicholſon.* Do you recollect his recommendation to the jury to uſe their exertions to prevent the paſſage of particular laws?

Mr. *Hall.* I think he uſed language in ſubſtance to that effect.

Mr. *Nicholſon.* In what way did he ſpeak of the adminiſtration?

Mr. *Hall.* I do not recollect particularly the manner.

Mr. *Nicholſon.* Is it your general impreſſion that he mentioned the adminiſtration?

Mr. *Hall.* I think he did, or elſe I inferred it from what he ſaid.

Mr. *Randolph.* Although you do not recollect the preciſe expreſſions of the judge, you inferred from what he ſaid that his deſign was to convey to the bye-ſtanders the idea that the adminiſtration was weak or wicked?

Mr. *Hall.* Yes, ſir, thoſe are my impreſſions.

Mr. *Nicholſon.* Were you on the jury?

Mr. *Hall.* Yes, ſir, I was on the petit jury.

Mr. *Rodney* here adduced a liſt of the grand jury for the circuit court held in the year 1800 in the ſtate of Delaware.

Mr. *Randolph* wiſhed that Mr. George Hay might be called to explain part of his teſtimony, that part which related to the converſation between the marſhal and himſelf, when the former was in purſuit of Callender.

GEORGE HAY *was accordingly called.*

Mr. *Randolph.* Did you endeavor to diſſuade the marſhal from the execution of his duty in the arreſt of Callender?

Mr. *Hay.* I certainly did not, and Mr. D. M. Randolph could not mean to convey to this honorable court that idea. I ſhould have been prevented from doing this by two conſiderations, one excluſively relating to myſelf, which I need not explain, the other, that I had a better opinion of Mr. Randolph than to ſuppoſe he would liſten to any ſuch ſuggeſtions. I did tell him that in my opinion he would not be able to get Callender, as I underſtood that he had attempted to make his eſcape, and that in the place in which he was, it would be impoſſible for the marſhal to diſcover him.

Mr. *Randolph.* Did you mention to him that he (Callender) would ſurrender at the next term?

Mr. *Hay.* I am not certain, but I believe I did.

Mr. *Randolph.* Were you at that time retained as counſel for Callender?

Mr. *Hay.* I was not retained as his counſel at that time, nor ever after; but I intended to appear in his defence for the ſake of defending the cauſe, not for the man.

Mr. *Randolph.* Were you averſe to proceed in the trial at that term for any particular reaſon?

Mr. *Hay.* I did not wiſh to appear before judge Chaſe, from an impreſſion that had been made on my mind in converſations with perſons who knew him. I conceived it would

be an unpleaſant buſineſs for me to carry into execution the intention I had formed to defend Callender. This impreſſion aroſe principally from the conduct the judge had manifeſted towards Mr. Lewis and Mr. Dallas, on the trial of Fries, at Philadelphia. He had there, as I underſtood, reſtrained them from managing the defence in the way which they thought proper. I did not expect any greater indulgence or advantage than had been allowed on that occaſion. I had therefore made up my mind to meet all the exigencies of the caſe with temper, but with firmneſs. The conduct of the judge on the trial of Mr. Thomas Cooper, had alſo its weight upon my mind. A great deal was ſaid about the judge's conduct on that trial, whether correct or not I do not ſay; but it made me unwilling to appear as counſel before judge Chaſe, though I was perfectly willing to undertake Callender's defence at the next term, before any other judge.

Mr. *Randolph.* What was the political complexion of the jury which tried Callender?

Mr. *Hay.* I am not perſonally acquainted with the gentlemen who compoſed that jury. I believe ſome of them did not live in the city of Richmond, but the impreſſion on my mind was, and ſtill is, that all the perſons on the jury were not only oppoſed to Callender, but decidedly ſo; and were diſtinguiſhed for the warmth of their political ſentiments.

Mr. *Randolph.* Are you acquainted with colonel John Harvie; what is his political character?

Mr. *Hay.* I know colonel Harvie, but what is his political character I do not know. I lived at Peterſburg and he at Richmond. I only knew that it was ſaid that he did not vote with the republican party.

Mr. *Randolph.* Are you acquainted with Mr. William Radford; what are his politics?

Mr. *Hay.* He was ranked among thoſe called moderate, but I am not well enough acquainted with him to decide upon his political character.

Mr. *Randolph.* Are you acquainted with Mr. Marks Vanderval, and what is his political character?

Mr. *Hay.* He is a very reſerved man, but has been uniformly regarded as a republican, though not a zealous one.

Mr. *Randolph.* In criminal actions, did you ever hear of a bill of exceptions being filed in Virginia?

Mr. *Hay*. Never, ſir; there can be no ſuch thing, it would anſwer no purpoſe; becauſe from a criminal court there is no court which has appellate juriſdiction.

Mr. *Randolph*. But caſes are transferred from the diſtrict courts to the general court.

Mr. *Hay*. There is a particular proceſs for that purpoſe; criminal caſes are not carried up after trial, for the deciſion in that caſe is final; but if the diſtrict court are unwilling to decide, it is then carried up to the ſupreme court.

Mr. *Harper*. I underſtood you to ſay that it was your intention to argue the point. What point did you mean?

Mr. *Hay*. I meant to contend againſt the conſtitutionality of the ſecond ſection of the ſedition law.

Mr. *Harper*. Did you not mean to argue it before the public, although you knew it would be unavailing if addreſſed to the court? Did you mean by that argument to acquit the traverſer, or to produce a political effect out of doors.

Mr. *Hay*. I meant to addreſs my arguments to the court; if they ſhould work the acquittal of the traverſer, or operate any wiſe in his favor, it was a thing to be deſired; if they ſhould affect alſo the public mind, that too was a deſirable circumſtance.

Mr. *Harper*. I aſk you now whether you did not ſay to the marſhal that Callender could not be defended, and that your object in requiring a continuance of the cauſe, was to gain time, and bring the trial nearer that period in which it was probable he might get a pardon?

Mr. *Hay*. I have no recollection of having ſaid any thing of this kind, but if Mr. Randolph (the marſhal) ſays that I expreſſed myſelf to him in that manner, I ſhall not contradict him.

Mr. *Harper*. I underſtood him to ſay ſo in his teſtimony.

Mr. *Hay*. I do not recollect it.

D. M. RANDOLPH was called in by Mr. Harper, and aſked whether Mr. Hay had not ſaid to him that Callender could not be defended, and that his purpoſe was to keep off the trial till the next court, in order to obtain a pardon.

Mr. *Randolph*. I do not recollect the words which were uſed, but I underſtood that Callender could not then be defended, and that he would ſurrender himſelf at the next term. I think it proper to remark one thing further; there never

was a pannel of the jury made out, or presented to judge Chase, or any other person, till the morning I made it out in court, before the commencement of Callender's trial, except in the case of the grand jury, when it is handed to the judge to appoint a foreman. In setting down their names on the list I arranged them according to my own idea of their respectability.

Mr. *Nicholson.* In your conversation with Mr. Hay, did he tell you that he wished to delay the cause, in order to bring it nearer the time in which he might obtain Callender's pardon?

Mr. *Randolph.* He did not use the words, but I thought he had it in his mind. I inferred it from the conversation.

Mr. *Randolph* wished to ask another question of Mr. HAY, who was thereupon called.

Mr. *Randolph.* Did you ever say that Callender could not be defended?

Mr. *Hay.* I cannot recollect what I may have said on that point, but I recollect perfectly that I was impressed with the idea, that he could not be defended, if the charge was either for writing or publishing the Prospect Before Us, for these facts were too notorious to be called in question. But I did then think, and always since have thought, that he might be defended on the ground of the unconstitutionality of the sedition law.

Mr. *Randolph.* Do you mean when you say that he might be defended on the ground of the unconstitutionality of the sedition law, that you would not have defended him on any other ground, such as a flaw in the indictment, or a mistatement of the matter of the book in the indictment?

Mr. *Hay.* Most certainly, sir, I meant to take advantage of any mistake or defect that might appear in the indictment, or in the evidence; and that may be evinced by recurring to my objection against the witnesses who were concerned with Callender in the publication, when I told one of them that he was not bound to give testimony which would go to criminate himself.

P. N. NICHOLAS *called.*

Mr. *Key.* Do they ever arraign a person for a misdemeanor in Virginia?

Mr. *Nicholas.* I do not recollect that they do.

JOHN MONTGOMERY was called in, at the inſtance of Mr. Nicholſon, who deſired him to explain ſome parts of his teſtimony.

Mr. *Montgomery.* When I was before this honorable court the firſt time, I ſtated that I ſhould not be able to ſtate all the charge delivered by judge Chaſe at Baltimore, or any particular part in the preciſe language which he uſed. From the examination of a great number of witneſſes before this honorable court, I am induced to believe that I have been miſunderſtood. When I firſt uſed the word adminiſtration, I uſed it not as the preciſe word he uttered, but what ſtruck my mind as being his ſenſe. The judge ſeemed to lay down a propoſition that the adminiſtration of government was ſo and ſo, and ſtated that their acts were not guided by a view to promote the general welfare, but principally to keep themſelves in the poſſeſſion of unfairly acquired power. I thought the judge explained his poſition by his alluſion to the repeal of the law creating the ſixteen circuit judges, the general ſuffrage law of Maryland, and the contemplated alteration of the judiciary law of that ſtate; I did not mean to ſtate that he ſaid Mr. Jefferſon was weak or feeble, but that the adminiſtration or the government was ſo. This is the impreſſion I then had, and now have with reſpect to that part of the charge. But I did not then ſay, nor do I now, that I uſe the preciſe words of the judge; but I think I follow his ſpirit and his meaning.

Mr. *Nicholſon.* At the concluding part of the charge did judge Chaſe recommend it to the jury when they returned home to uſe their influence to prevent the paſſage of the judiciary bill, or was that an inference from what he delivered?

Mr. *Montgomery.* That part of the charge was in the expreſs words, and not an inference at all. I recollect that ſhortly after I had a converſation with ſeveral gentlemen, who concurred with me in opinion that theſe expreſſions were uſed; and I recollect that on the very day the charge was publiſhed in the Anti Democrat, or the day after, I called theſe expreſſions to the recollection of the ſon of judge Chaſe, and obſerved that theſe parts were omitted in the printed ſtatement.

Mr. *Harper.* I am deſired by judge Chaſe to make of this honorable court the requeſt contained in the following letter, which I will read:

« Mr. *Preſident*,

« The ſtate of my health will not permit me to remain any longer at this bar. It is with great regret I depart before I hear the judgment of this honorable court. If permitted to retire, I ſhall leave this honorable court with an unlimited confidence in its juſtice; and I beg leave to preſent my thanks to them for their patience and indulgence in the long and tedious examination of the witneſſes. Whatever may be the ultimate deciſion of this honorable court, I conſole myſelf with the reflection that it will be the reſult of mature deliberation on the legal teſtimony in the caſe, and will emanate from thoſe principles, which ought to govern the higheſt tribunal of juſtice in the United States."

The Preſident obſerved that the rules of the Senate did not require the perſonal attendance of the reſpondent; whereupon judge Chaſe bowed in a very reſpectful manner, and withdrew.

Mr. HAY came again to the bar to explain the motives which induced him to undertake the defence of Callender.—He ſaid he was not without ſome hope that his arguments againſt the unconſtitutionality of the ſedition law, although they might not be concluſive with the court, would nevertheleſs have ſome weight with the jury, and might operate to produce the acquittal of Callender.

Mr. *Randolph*. On behalf of the managers, I have to requeſt of the court, that further progreſs in the trial be poſtponed until to-morrow, in order to give thoſe gentlemen who follow, time to digeſt, compare, and collate the great volume of teſtimony which has been given. We ſhall be ready to proceed to-morrow. There is alſo another reaſon for this requeſt; we expect hourly ſome important witneſſes, and are in hopes that they will make their appearance in town before the next meeting of the court. If, however, this ſhould not be the caſe, we ſhall proceed without them. If they come, we preſume we ſhall be permitted to take the benefit of their teſtimony.

Preſident. I underſtand that gentlemen have nothing further to offer.

Mr. *Randolph*. Not, ſir, at this time.

M. *Harper*. I beg leave to ſtate that we do not join in the motion for a delay, though we do not oppoſe it.

Preſident. Is the courſe of the arguments on each ſide underſtood?

Mr. *Nicholſon.* We underſtand that the managers will open; that reply will be made by the counſel for the reſpondent; and that the managers will then cloſe.

Mr. *Key.* This is the uſual courſe, and we have no objection to it.

The court then roſe.

WEDNESDAY, *February* 20, 1805.

The court was opened at 10 o'clock.

Present, the Managers, accompanied by the House of Representatives in committee of the whole: and the counsel of Judge Chase.

Mr. *Nicholſon.* We expected a witneſs from Virginia; but he has not arrived: a witneſs, however, from Maryland is preſent, whom we wiſh to examine.

PHILIP STEWART *ſworn.*

Mr. *Nicholſon.* Were you a member of the grand jury ſummoned to attend the circuit court held at Baltimore, in May 1803?

Mr. *Stewart.* I was.

Mr. *Nicholſon.* Do you recollect any particular expreſſions uſed by judge Chaſe in his charge to the jury?

Mr. *Stewart.* I have but an imperfect recollection. I have never ſeen the charge, nor have I heard it read ſince it was delivered.

Mr. *Nicholſon.* Had you not ſome reaſon for attending to the charge, other than your duty as a grand juror?

Mr. *Stewart.* There were ſome things which ſtruck my mind with ſome force.

Mr. *Nicholſon.* Had you not been a member of the legiſlature of Maryland?

Mr. *Stewart.* I had.

Mr. *Nicholſon.* Did he not throw ſome cenſure upon the members of that ſtate legiſlature?

Mr. *Stewart.* I felt ſomething of the kind, but I cannot tell his expreſſions.

Mr. *Nicholſon.* Do you recollect his ſpeaking of the ſons of ſome gentlemen who had aſſiſted in framing the conſtitution of Maryland, what were his expreſſions?

Mr. *Stewart.* If I were to hear the charge read I could perhaps point them out.

Mr. *Nicholſon.* I will ſtate the queſtion more preciſely.—Did he uſe the words *degenerate ſons*, and apply that epithet to the members of the legiſlature?

Mr. *Stewart.* To the beſt of my recollection he did; he ſpoke of degenerate ſons of fathers who had formed the conſtitution of the ſtate, which they were about to deſtroy by the introduction of the general ſuffrage bill.

Mr. *Nicholſon.* Did he recommend to the grand jury when they returned home, to uſe their influence to have ſuch men elected as would vote againſt the judiciary bill then pending before the legiſlature?

Mr. *Stewart.* I do not recollect.

Mr. *Harper.* I will aſk you, ſir, whether the word *degenerate* was inferred by you, or did you actually hear it.

Mr. *Stewart.* I believe I heard it.

Mr. *Martin.* Have you ever ſeen any publication of the charge?

Mr. *Stewart.* I have not.

The *Preſident.* If no further witneſſes are to be introduced, I would enquire whether gentlemen conſider it neceſſary to detain thoſe who have been examined?

Mr. *Nicholſon.* It is poſſible that gentlemen may differ in their account of the teſtimony; but if there is no diſpute on that point the witneſſes I think may be diſcharged.

Mr. *Martin.* There is a liſt of the grand jury ſummoned at the circuit court in Delaware; I do not know for what it is filed; until we are informed on that point we ſhall be under the neceſſity of detaining the witneſſes from that ſtate. Is it intended to ſhew that there were men of different political ſentiments on that jury?

Mr. *Rodney.* We have nothing more to prove from that liſt than what has already been ſtated.

Mr. *Harper* ſaid the counſel for the reſpondent would have no objection to diſcharge all the witneſſes; but muſt object to diſcharging part of them.

The *Preſident*. If the gentlemen do not agree upon the diſcharge of the witneſſes, I will take the ſenſe of the Senate upon the point.

Mr. *Harper*. The particular ſituation of Mr. Tilghman's family requires his return to Philadelphia. I muſt therefore requeſt that his further attendance be diſpenſed with.

The *Managers* conſented, and Mr. T. was diſcharged.

The queſtion was then taken by the Preſident on the diſcharge of all the witneſſes, and loſt; there being 16 votes in the affirmative, and 17 in the negative.

Mr. *Rodney* requeſted the diſcharge of the witneſſes from Delaware; which being conſented to by the reſpondent's counſel, they were diſcharged.

It may be proper here to notice that, from time to time, during the trial, witneſſes were diſcharged with conſent of the parties.

The testimony having been closed on both sides,

Mr. EARLY rose, and addressed the Senate as follows:

MR. PRESIDENT,

THERE is no attitude, in which the government of this nation can be viewed, more completely demonstrative of the *efficacy* of its principles than that in which it is now placed. We are now occupied in an act well calculated to test the *practicability* of those principles, and to prove their fitness or unfitness for the condition of that country over which they are destined to rule. There is presented before this great depository of national justice, a highly important officer of the government, charged with acts violative of some of its leading and most essential principles. An officer who has been cloathed with the function of administering to a great and rising people the blessings of freedom in their most vital relations, is the object against whom charges of this serious nature are exhibited. He stands charged with violating the sacred charter of our liberties, and with setting at naught

the most holy obligations of society. He stands charged with perverting the high judicial functions of his office for the purposes of individual oppression, and of staining the pure ermine of justice by political party spirit. These charges are founded upon transactions which have passed in review before an inquiring world, and which in the estimation of the representatives of the American government have cast a foul reproach on their national character. To this tribunal have they appealed for a vindication of that character. Hither do they appeal for the preservation of the dearest principles of their liberty, and for the sure support of their most sacred rights. It is here they must enter the complaints of the nation. It is here they must drag the *guilty* to punishment.

The first article, preferred by the house of representatives in support of their impeachment, charges a conduct upon the respondent, which strikes at one of the most vital principles of the government of this nation; the right of "trial by an *impartial* jury." It ought never to be forgotten that the deprivation of this right was one of the injuries for which the people of this country put to the risk of a revolution all that was dear. Nor ought it to be forgotten that the security of this right forms one of the great *safeguards* of the federal constitution. "In all criminal trials "the accused shall enjoy the right to a speedy and "public trial by an *impartial* jury of the state and "district."

The relative rights of judges and juries have at some periods of judicial history been so little understood, and the limits of each so indistinctly marked, that the benefits of the institution of jury trial were left much at the mercy of *arbitrary and overbearing judges*. But it was reserved for the honor of modern times to dissipate this uncertainty so baneful to justice, and to fix down the establishment upon its only

proper foundation; that of the right to determine without control, both the law and the fact in *all criminal cases whatsoever*. This right has now been so long practiced upon in the United States, and may be considered as so well established, that it is scarcely to be expected we shall witness upon that point any difference of opinion. Still less is it to be expected that we shall witness such difference, when we are discussing principles which apply to cases capital. In such cases it is the glory of the laws of this country, that the offence of the accused should be left exclusively to the judgment of those least liable to be swayed by the weight of accusing influence. It is no part of my intention to deny the right of judges to expound the law in charging juries. But it may be safely affirmed that such right is the most delicate they possess, and the exercise of which should be guarded by the utmost caution and humanity.

The accused shall enjoy the right to a "trial by an *impartial* jury." We charge the respondent with deliberately violating this important provision of the constitution, in arresting from John Fries the privilege of having his case heard and determined by an impartial jury: For that the respondent took upon *himself* substantially to decide the case by prejudging the law applying thereto, at the same time accompanying the opinion thus formed and thus delivered, by certain observations and declarations calculated necessarily to create a prepossession against the case of Fries, in the minds of those who had been summoned to serve upon the jury, thereby making them the reverse of impartial.

These were the acts of a man who, from his own declarations, appears to have well understood upon what *points the defence would turn*. It was the act of a man, who it appears had been well informed of all that passed at the previous trial of Fries; who knew that there was no dispute as to facts, and that the whole of the

defence depended upon the discussion and determination of those very principles of law which he had thus prejudged, and upon the application of those authorites which he had thus excluded in the hearing and very presence of those who were to pass upon the life and death of the accused. No argument had been heard from counsel; no opportunity had been afforded to prove that the offence committed did not amount to the crime charged; no defending voice had been raised in behalf of the accused; but without being heard, and without having had any opportunity to be heard, his case was adjudged *against* him. I say, *adjudged against him without the chance of being heard.* For surely the case was adjudged against him, when the only point upon which it was defensible was determined against him, and that determination publicly announced from the bench. That this was done before the accused could possibly have had a chance of being heard is placed beyond contradiction by all the testimony. And that the judge knew the point, which he thus prejudged, to be the only ground upon which the defence rested, is perfectly clear. For from his own declarations at the time of announcing the opinion, it appears that he was well acquainted with all that had passed at the previous trial of Fries.

But, sir, we must look further into the progress of this transaction. It was not enough, that the poor trembling victim of judicial oppression should thus have his dearest privileges snatched from him by a prejudication of his case! It was not enough, that the impartiality of those who were to compose his jury, should be converted into a prepossession against him, by the imposing authority of solemn declarations from the bench! But the small remaining darling hope of life was to be smothered by a preclusion of his counsel from arguing the law to the jury. This fact, though sternly denied in the answer of the respondent, has nevertheless been established in a manner which

must irresistibly force conviction upon the mind. Mr. Lewis affirms it positively. Mr. Dallas confirms it in a manner peculiarly strong. Not being himself present when the opinion was delivered to the bar, he received from Mr. Lewis a statement of what had passed, and in an address to the court afterwards repeated distinctly this statement, and particularly that part which attributed to the judge a declaration that if the counsel had any thing to say upon the law, they must address themselves to the court and not to the jury.—To this statement no reply was made by the court, either correcting or denying it. Thus stands the evidence in the affirmative. Opposed to this we have the negative testimony of Messrs. Rawle, Tilghman, and Meredith, who have no recollection of any such declaration. I address myself to those who well know the difference between affirmative and negative testimony. I address myself to those who well know the established rule in the law of evidence, that the testimony of one affirmative witness countervails that of many negative ones; and I am sure that I address myself to those who must feel the complete coincidence of this rule with the dictates of common sense. Upon this ground alone we might safely rest our proposition. But, sir, we will not rest it here. It appears from the testimony of the witnesses on both sides, that almost every observation from the counsel to the court on the second day was predicated upon the idea that something had been said on the preceding day restrictive of their privileges. These observations, although addressed to the court and carrying this feature prominent in their face, were neither contradicted nor corrected by the court. This was a strong tacit admission of the correctness of the idea upon which they were bottomed. But, sir, we have not only this tacit admission, but we have in testimony, this strong and impressive declaration from judge Chase, that " the counsel might be heard in opposition

" to the opinion of the court, at the hazard of their cha-
" racters."

But, Mr. President, we have the positive admission of the respondent, in page 18 of his answer, that certain observations were made by him condemning the use of common law authorities upon the doctrine of treason, and also condemning authorities under the statute of treasons, but prior to the English revolution. (Here the passage was read.) By a recurrence to page 22 of the answer, it will be found that the respondent admits that these observations of his were made on the first day; yet, sir, nothing of all this is remembered by Messrs. Rawle, Tilghman, or Meredith. How light then, how extremely light must their bare want of recollection weigh against the positive affirmative testimony of Mr. Lewis, and Mr. Dallas.

Considering my position as uncontrovertibly established, I will proceed to observe, that the offence with which Fries stood charged was the highest possible offence which can be committed in a state of society. The punishment annexed to its commission was the highest possible punishment known to our laws. The accused was therefore entitled to every possible indulgence. In favor of life, not only every possible ground should be occupied by counsel to the jury, but every possible argument listened to and weighed with patience and forbearance: and it should never be forgotten, that judge Chase had such a conduct set as an example before him, in a previous trial of the same case. Yes, sir, a brother judge of his, who has since gone to the world of spirits, had set him an example conspicuous for the purity of its excellence, and which should have arrested his career in the commission of this cruel outrage upon all humanity. But judge Chase predetermines the law; then prohibits counsel from proving to the jury that the law was not as laid down. This was in effect an

extinguishment at once of the whole right of jury trial. All the privileges and all the benefits of that institution were swept at once from an American court of justice, and scarcely the external form preserved. The law was predetermined by the judge, and the accused was debarred from pleading it to the jury. Of what avail is it, sir, that the jury should be made judges of law and of fact, when the law is not permitted to be expounded to them? Of what avail is it that the accused should have a trial by jury, when he is prevented from stating and explaining to the jury the only grounds upon which his case is defensible? The right to hear and determine facts is *not more the right* of a jury, than the right to hear and determine the law. To deprive them then, of the privilege of hearing and determining the law, is as much a violation of their rights, as to deprive them of the privilege of hearing and determining facts. The right of the accused to be heard upon the facts to the jury, is not more his right, than the right of being heard upon the law to the jury. To deprive him then of the privilege of being heard upon the law to the jury, is as much a violation of his rights, as to deprive him of the privilege of being heard upon the facts to the jury.

But, sir, we are assailed by a train of reasoning on the part of the respondent, in exculpation of his conduct, which it may be proper to notice in part at this stage of the argument. He informs us in his answer, that the law of treason having been solemnly settled by prior adjudications, he was not at liberty to depart from the principles so settled, even had he thought them incorrect, and he enters into a lengthy discussion to shew the importance of uniform adherence to doctrines properly considered and solemnly established. It is no part of my intention to dispute either the correctness of the decisions previously made upon the constitutional doctrine of treason, or the propriety of an adherence to those decisions on the part of judge

Chase. For although I consider both extremely questionable, they yet appear to me to constitute no part of the present inquiry. This inquiry is whether the judge was authorized or can be excused for delivering an opinion upon the law before counsel were heard on the part of the accused, and for debarring counsel from the exercise of their constitutional privilege to address the jury on the law as well as the facts, thereby making the opinion thus prejudged and thus extrajudicially delivered completely decisive of the case. And give me leave to say, sir, that the reasoning, resorted to by the respondent to excuse this conduct on his part is, in my opinion, an aggravation of his offence. It is of importance truly that juries should be guarded against improper impressions from counsel, by having the law previously explained to them! And it is a favour to counsel to be informed that the ground they mean to occupy is not tenable, that they may look out for other resources! Would not this reasoning go to authorize a judge in all criminal prosecutions to settle the law before the case was heard? He has nothing else to do, sir, according to this doctrine, than to inform himself of the facts, as in Fries's case, and then before any trial is had settle the law; at the same time prohibiting counsel from arguing that to the jury. And if the reason that the law has been so solemnly settled that it cannot be departed from is to form an excuse, the more settled the law, the longer practiced upon, the stronger the reason. In every case of murder or theft then it is to confer a favour on the counsel to inform them what grounds are not tenable. It is of importance to instruct the jury what the law is upon the case, that they may be guarded against improper impressions, and then to render this object effectual prevent the counsel from arguing the law to the jury. In the case of Fries I hold it that the knowledge of the judge that the case depended solely upon legal principles is a circumstance highly

aggravating his offence. He knew that there was no dispute as to facts, and that by thus prejudging the law, he fixed the destiny of the accused. But it was material to do this to guard the jury from improper impressions! My God! has it come to this? And is this the amount of our boasted constitutional right of jury trial, that they whose exclusive right it is to determine both the law and the fact, are to be guarded from improper impressions by the prejudged, extra-judicial opinion of him who possesses no right to determine either!

We are told by the respondent, that he not only never interdicted the counsel for Fries from arguing the law to the jury, but that he afterwards on the next day expressly offered to let them take as wide a range as they pleased. Mr. President, I must confess I have been disappointed. I had expected that much of the defence against the first article would have rested upon the transactions of that day. I had so expected, not because of any opinion of my own, that from them any substantial excuse could be extracted; but because public opinion had somewhat inclined to rest an excuse upon that foundation. For myself, it has been my misfortune to be unable to perceive in this part of the transaction any features other than such as afford additional proof of the unjust and oppressive intent with which the judge appears to have acted. Indeed, sir, the respondent must himself have considered the transactions of the second day, as dangerous topics. He has touched them lightly indeed. If his conduct had been so free from blame as is contended in the answer, why was an appearance of fairness to be cast over the scene by having the papers recalled upon which the opinion had been written, whilst the opinion itself remained? A short view of this part of the transaction may not be unimportant. It may afford us some strong proofs of the motives of the respondent. We are involuntarily lead to inquire why the papers were recalled? Was it

because of the oppressive tendency with which they operated upon the case of the accused? Was it because of any conviction on the part of the judge of the impropriety of the steps he had taken, or compunction for the cruel situation in which he had placed poor Fries? No, sir! The papers were recalled because of the firm and manly stand made by the counsel. It was because those counsel were men of characters too independent, and were governed by a sense of duty too high to submit to such a prostration of their rights. The determination to recall the papers was not taken until after it was seen that the counsel would abandon their cause rather than acquiesce in a conduct so oppressive and so injurious.

This recalling of the papers was a farce acted for the purpose of giving a specious appearance to the face of things; but the folly thereof could only be exceeded by the criminality of the first act. Was the crime the greater because the opinion was written? Was it the act of writing the opinion and throwing down the paper to the bar which constituted the evil to Fries? Or was it the formation of a prejudged and extrajudicial opinion completely decisive of the case, and the communication of that opinion in the very presence of those who were to try the accused? In my opinion it was the last. The evil was complete by the act of prejudication, and withdrawing the paper could have no possible effect. The case of the accused had been predetermined....had been extrajudicially predetermined....predetermined by the judge who had no right to determine it at all; and the counsel were left to the forlorn hope of convincing the judge that the opinion delivered by him was erroneous. "They might "be heard in opposition to the opinion of the court at "the hazard of their characters." This is his declaration on the second day.

If then I were asked, as were Fries's counsel, on the second day, by the other judge, and as I know

many are now disposed to ask, whether, if an error had been committed, I would not suffer it to be corrected? I would answer that this was an act which from its nature admitted of no correction. It was a *crime* complete in its performance, and complete in all its baneful consequences. Repentance, even had there been any, could have afforded no relief; it came too late. As well might a man, after he had inflicted a mortal wound upon another, ask to be forgiven, because before the death of the wounded he was brought to relent, from an apprehension of the consequences. In my opinion, judge Chase had committed the sin not to be repented of.

As to the proffered permission to the counsel on the second day that they might proceed without the restrictions before imposed, it has been my misfortune to be unable to perceive either any proof of a disposition to relent on the part of the judge, or any privileges to the counsel which placed them or their client upon ground more advantageous than that on which they had before stood. On the contrary, I think I perceive in the whole of the judge's conduct taken together, on the second day, a deliberate design to impose upon the understanding of those present, by exhibiting the external form of fairness, whilst he continued to hold on upon the substance of injustice. For notwithstanding there appeared from his expressions at first a disposition to permit the counsel to argue the cause without any restraint, yet it ought to be kept in constant recollection, that when brought to explain himself, the general permission which had been thus apparently given, was subjected to restrictions of very serious import. The counsel were permitted to argue the law to the jury, but the manner in which they should do so, would be regulated by the court. The counsel were permitted to lay down the law, but should not read cases which were not law. That common law cases, and cases under the statute

of treason, but prior to the revolution in England, were not law and should not be read. Look at the consequence! The counsel might argue the law to the jury, but were interdicted from the use of those authorities, which in their opinion bore most strongly upon the case, and upon which, it was within the knowledge of the judge, they had principally relied in the prior trial. They might lay down the law to the jury, but should not read cases which were not law. And who was to determine whether the cases offered by counsel were or were not law? The judge. And pray, sir, was not the right of the jury to determine the law, as effectually invaded by the judge's taking upon himself to determine each case as it was offered, as their right was invaded, by the judge's determining upon the whole together? I maintain, sir, that it is not the right of the judge in criminal, and especially in capital causes, to determine that any case is not law; for if he can determine that question as to a single authority, and upon that ground arrest it from the jury, he may do so as to all, and thus as effectually abolish the great privilege of trial by jury. I know it may be objected to this reasoning, that unless some restriction is imposed upon counsel, they may abuse their privileges by reading any thing however inapplicable to the jury. This, sir, is to suppose an extreme case, and it is never correct to reason from extreme cases. It is no proof against a privilege, that it is subject to be abused. And there is a security against extreme abuse in this privilege, from the regard which professional men necessarily feel for their professional reputation.

Here, Mr. President, we might close the argument upon the first article. But it is not possible; no, sir, not possible here to stop our reflections. When we review the ground which has been already travelled over; when in that review we behold an American citizen summoned to the bar of justice to undergo a trial in

which his life is at stake; when we behold his judge, contrary to all precedent and in violation of every feeling of humanity, pre-occupying the only ground upon which the case of the accused was defensible, and closing upon him this only possible avenue to safety, truly I feel that my feeble powers of language are not competent to a description of the scene; it must be left to the strong expression of silence. For this transaction then in the name of the American people we denounce judge Chase. We denounce him for invading their most valuable privilege, *the trial by jury.* We denounce him for taking into his own unhallowed hands, the disposal of the life of an American citizen; and we invoke the justice of the nation to expiate by the proper punishment this most unholy sin.

The second, third, and fourth articles, exhibited by the house of representatives, charge the defendant with a course of conduct upon a particular trial which affords many grounds of accusation. In this case it is true no unfortunate individual was charged with an offence which demanded his life as an expiation; yet, sir, there were other rights involved equally sacred in the laws of a free country. The liberty and the property of the accused were the price of a conviction.

In casting our eyes over the ground upon which the different scenes of the transaction now about to be examined are spread, we are struck with a feature not usual in the history of human concerns. It would seem that even the restraint of appearances was no longer felt. We find the respondent setting out with a conduct, which seemed to prove that the fate of the accused was fixed. We find him pursuing a system of conduct throughout, which arrested from the accused some of his best established and most valuable privileges. We find him endeavoring to heap shame and odium on those who occupied the station of advocates, because they would not tamely yield to his unwarrantable invasion of long established rights.

Mr. President, notwithstanding the labored attempts made by the defendant in his answer to exculpate himself from imputation in compelling Mr. Basset to serve upon the jury in the trial of Callender; yet, sir, I must be permitted to say that those attempts appear to me to be only the exertions of a mind conscious of impropriety, and seeking to impose upon the understanding of others. The test adopted, by which to try the impartiality of the jurors, in that case may possibly, by some be held a correct one; but the *manner* of *applying* that test as then practised upon, is what I believe can be accounted for upon no other supposition than that of a determination on the part of the judge to procure the conviction of the accused.—Upon what other principle can it be accounted for, that the jurors should be asked "whether they had formed and delivered an opinion upon the charges laid in the indictment, when they knew not and were not suffered to know what those charges were? Why else could it be laid down by the judge, that because the individuals called to serve upon the jury, did not know what charges were in the indictment (having never seen it nor heard it read) that therefore they could not have formed and delivered an opinion upon the subject? And why else did the judge, when this monstrous logic was contradicted by the *fact* of one of the jurors delivering in open court an opinion upon the whole subject of those charges, without having seen, or heard the indictment read; why else did the judge, in the teeth of this damning fact, order the juror sworn?

Every juror sworn might, like Mr. Basset, have formed and delivered an opinion which concluded the conviction of the accused, and yet because they did not know that the subject matter of such opinion constituted the charges in the indictment, having neither seen it nor heard it read, the expression of such opinion, created no disqualification. Unworthy

evasion! An evasion which prevents the doctrine of disqualification in a juror from receiving any practical operation. An evasion which effectually puts at nought that principle of the constitution so often adverted to in a former part of the argument, that "the "accused shall enjoy the right of a trial by an impar- "tial jury." Upon this point I beg leave to read two authorities. [Mr. Early here cited 3 Bac. Abr. 176, and Co. L. 157 l.]

But we are told by the respondent in his answer, that the declaration made by Mr. Basset, did not disqualify him, because it contained no direct opinion as to the guilt of the *traverser*. This I understand to be the amount of all the labored reasoning and nice distinctions drawn by the respondent upon this point. There is, sir, a plain common sense rule to govern us upon this subject, which in my opinion is as safe in its application as it is reasonable in its principle. A juror must be *indifferent*. How must he be indifferent? What kind of indifference is this which is made necessary? The manner in which judge Chase has stated and explained this rule is certainly calculated to confuse and mislead. "The juror, says he, must "be indifferent between the government and the ac- "cused as to the subject matter."

Must the juror in reality be indifferent between the parties as to the subject matter of prosecution only? Will not a prejudice against the accused, flowing from other causes, create a disqualification? I address myself to those who well know that partiality, arising from a variety of relations in society, as well as prejudice arising from a variety of causes, destroys that character of indifference necessary to render a juror competent, and that this partiality or prejudice need not relate to the subject matter of prosecution.

So also I apprehend that this character of *indifference* is as effectually destroyed by a prejudice as to the subject matter, without any prejudice as to the per-

son. I mean the prejudice of a prejudication of the criminality of the subject matter. We meet with the rule every day, that it is good cause of challenge to a juror that he hath expressed an opinion upon the subject matter of prosecution. Wherefore then the manner of stating the rule, which we find adopted in the answer? Most evidently to suit the respondent's case. What, sir, must a juror, to be so prejudiced as to be disqualified, have expressed an opinion not only that the subject matter of prosecution was criminal in law, but that the person prosecuted was the author of the crime? Yes, sir, according to the doctrine of the answer, he must have prejudged both *law* and *fact*. In other words, although Mr. Basset had formed and delivered an opinion that such a book as "The Prospect Before Us," came within the sedition law, yet not having said that Callender was the author or publisher, he was still a competent juror. Suppose a man indicted for murder, in a case where there is no dispute as to the fact of killing (and here there was no dispute as to the fact of publishing) but the defence set up was that he was excusable. A juror has given his opinion, in reference to the act, that such a killing does amount to murder, but without saying that the person prosecuted was the murderer; will any man say that this expression would not disqualify him? I am bound to presume not. Sir, in the case of Callender, although Mr. Basset did not say that the person prosecuted was guilty, yet he did in effect say that whoever wrote or published the book was guilty. And give me leave to remark here that in prosecutions for libels, the question of law, as to their criminality, is generally the only question of dispute. The fact of publication is one about which there seldom occurs any difficulty, and has to be proven merely because not admitted. To have expressed an opinion then upon the question of law in such cases is substantially to have prejudged the

whole case. A juror under such circumstances cannot be called impartial. As well might it be alleged that judge Chase himself was impartial, as to the case of Fries, after he had delivered the opinion which we have before discussed.

We are told in the answer that the guilt of the traverser was not prejudged by Basset, for another reason; that as the charges to make them criminal must have been false, so Callender might have exculpated himself by proving their truth. But, sir, the traverser was at liberty to rest his defence either upon a justification or want of criminality in law, or upon both. He was not bound to disclose which, nor could the judge officially know which. Both and each of these grounds were proper for the jury to determine under the plea. The acquittal of the traverser then did not depend exclusively upon the proof of the truth of the charges.

Again we are told that the juror barely expressed his opinion upon the book, as the contents thereof had been represented to him. The same may be said of almost every other case. Few, very few jurors are spectators of a murder, or an act of treason. Any opinion they may have formed and delivered of the actual guilt of the person charged must be in nine cases out of ten, from representation. Few, very few of the jurors who were summoned in the case of Fries, had been spectators of the acts which were alleged to have been treasonable; probably not one of them. Yet we learn from the answer of judge Chase, that in that very case several were repelled from serving, because of the opinions which they acknowledged they had given. Such opinions must in nine cases out of ten be bottomed upon representation. There are numerous secret crimes, which from their very nature preclude the possibility that an opinion concerning them, however positive, and however decisive of the conviction of the accused, should be founded upon

any previous knowledge of facts. And yet, sir, I presume no person will deny that in such cases, a juror may nevertheless so express an opinion as to disqualify himself from serving.

But, sir, the scene rises upon us. We have now to examine a part of the transaction for which, I had supposed, human invention might be tortured for a paliation in vain. I allude to the rejection of Mr. Taylor's testimony. The reason assigned for that rejection was, that the witness could not prove the truth of the whole of *any one charge*. Let us for a moment examine the consequences of this doctrine. According to the judge's own decisions then, as well as his doctrine now, each charge laid in the indictment must have constituted a separate offence. For it is explicitly declared both by Mr. Hay and Mr. Nicholas, that when an application was made to continue the case, because of the absence of some material witnesses, the application was rejected upon the ground, that it did not appear from the affidavit filed, that the witnesses so absent, could prove the truth of all the charges. That proof of the truth of a part only, would be of no avail, and that the whole must be proved to intitle the traverser to an acquittal. Each charge in the indictment then must have constituted a *separate offence:* for the charges cannot be made to help each other out. One charge, however, it seems might consist of different facts. This was the case with several in that indictment. It was particularly the case with the very charge, the truth of which Mr. Taylor was called to prove. "The President was a professed aristocrat. "He had proved faithful and serviceable to the British "interest." Here was a charge made up of two distinct facts; so distinct in their nature, that the knowledge of their truth might not only rest with different persons, but was extremely likely not to rest with any *one* witness. Put the case of a man charged with any offence, murder, theft, or any other crime you please: There may be a string of facts upon the proof of which

the defence may depend; some within the knowledge of one man; some within that of another. Was it ever heard of before, that because one witness could not prove the existence of all those facts, that therefore such witness should not be examined as to what he did know? Or if some of the facts depended upon written testimony, was it ever heard of before that therefore a witness should not be examined as to those resting in oral testimony? To these questions no man will answer in the affirmative. Why then was an unheard of and palpably absurd doctrine brought to bear in Callender's case? Was the defence of justification, under the sedition law of the United States, such an anomaly in its nature, that none of the established rules of jurisprudence would apply to it? Was it a thing so *entire* in its nature, that it could not consist of different parts? I have always been taught, and the respondent's answer confirms the principle, that a defence must apply to the whole of a charge. If then a charge consist of different parts, surely so must the defence. But according to judge Chase, be the parts ever so many, they shall not be proven, unless the proof can all be made by one witness, or unless it appear that the defendant has proof in reserve to establish all. I ask this honorable court how it can appear that the defendant has proof in reserve applying to all the parts of a charge? Suppose a witness called to substantiate *one part*, how is it to be known to the court whether there is or is not other testimony behind in the power of the party, by which the residue of the charge may be established? We are told by the respondent, that none of the questions propounded to colonel Taylor had any application to the charge, except the first, and this only to a part of the charge; and that this question was repelled because no proof was offered as to the residue. I answer, sir, that the judge had no right to know, nor were the counsel bound to disclose whether there was such testimony in reserve or not.

It is a new doctrine, sir, that the legal admissibility of testimony is to depend upon what the party can afterwards prove by other testimony. It is the right of the party to establish his defence as far as he can, and if he fail in establishing it completely, the evil is to himself alone. And permit me here to add, sir, that whether he succeed in establishing his defence or not, is a question for the jury to determine, and not the judge. The judge possesses no right to *determine* even after the testimony is finished, whether that testimony has or has not established the defence; still less then can he before it is heard, determine that it will not make good the defence.

We are told in the respondent's answer that his rejection of colonel Taylor's testimony can be no proof of a determination on his part to oppress, as such an intention might have been gratified by the conviction of the traverser upon the other articles. This is true, very true, upon the principle that the judge and not the jury was to determine the question of law in criminal cases. If the criminality of the charges in point of law, was to be settled by the judge, his conclusion is certainly correct. But if, as I apprehend, the criminality of the charges was to be exclusively determined by the jury, then it was not entirely certain, that the judge might have been sure of his object, notwithstanding the tenth charge had been proved. For aught he knew, or ought to be presumed to have known, the jury might have been of the opinion that the other charges did not come within the sedition law, and might have therefore given a verdict of acquittal.

But, Mr. President, this apart, it is a novel proof of innocence to me at least, that a man should have the magnanimous boldness to disregard appearances. It is a novel proof of innocence that a man should possess a spirit daring enough to insult the common sense of mankind. Yes, sir, I yield to the respondent the full share of glory, which he is desirous of accumulating from this source.

The last of the three articles now under examination goes on to charge the defendant with various acts of injustice, partiality and intemperance, highly derogatory to his character as a judge, and equally injurious to the reputation of the American bench. Without fatiguing the patience of the honorable court with an inquiry into the proofs and an investigation of the criminality of all the particulars here enumerated, I beg leave to call their attention to one part of the judge's conduct, which appears to me to stand pre-eminent for its open defiance of all justice, and its flagrant violation of the constitution of this country. I allude to the refusal to continue the cause. The reasons assigned for that refusal, were, we learn, that it did not appear by the affidavit exhibited, and upon which the motion for a continuance was founded, that the witnesses, whose testimony was wanted, could prove the truth of all the charges laid in the indictment. This conduct, Mr. President, strikes me as being of the same family with the rejection of Mr. Taylor's testimony. The charges in the indictment are in number many. They embrace a numerous collection of facts, some of them assimilated, others extremely variant in their nature; many of them involving legal difficulties as to their criminality. Under the plea of not guilty, to the indictment, it was competent to the traverser not only to prove the truth of the charges in point of fact, but also to prove that any of the charges were not criminal in point of law. It was competent for the defendant to prove the truth of a part of the charges, and to contend that the rest were not seditious. Both these grounds of defence were proper for the jury, and the jury possessed the right to pass without control upon both. With what propriety then could the judge pronounce from the bench that to intitle the accused to a continuance, it must appear that he could prove the truth of all the charges? What, sir, was the question of law as to

their criminality, a point which the judge here again arrogated to himself the exclusive right to determine, and that too before the traverser was heard? Indeed it would appear that in this case also, as in the case of Fries, the law was to be arrested from its proper organ, the jury, and to be exclusively passed upon by the judge himself. What other construction can be given to his determination that the truth of all the charges must be proven? There surely could be no necessity for this, unless they were all seditious within the act of congress. By determining then, that all must be proved true, the judge did determine that all were seditious. This, sir, it was the exclusive right of the jury to determine.

The constitution of this country has most wisely provided, that "the accused shall have compulsory "process for obtaining witnesses in his favor." Of what avail is this provision if time be not given for their attendance? Of what avail to grant the process, and, before the witnesses can by any physical possibility reach the place, force the accused to trial? This conduct, sir, is worse than mockery. It is an insult to the common sense of mankind. It is high treason against the majesty of the constitution of a free country. The constitution of the United States gives to the accused the right of process to compel the attendance of his witnesses. But judge Chase so administers, that the accused is indicted, arrested, tried, convicted and punished, all in the same term, whilst his witnesses are distant hundreds of miles.

After all this, Mr. President, surely we shall not be asked for proofs of corrupt intent. They are too thick upon every feature of the transactions which have been examined. The defendant is on all hands acknowledged to posses an acquaintance with the laws and constitution of his country, which yields not to that of any other man in this nation. He is on all hands acknowledged to possess talents which might do honor

to any tribunal. With such knowledge and such talents, permit me to ask, if it was within the compass of possibility that he should mistake in points so familiar as those in which he is charged with criminal conduct? Although all things are possible, yet there are things the extreme improbability of which defies belief. Among those I rank the supposition of mistake on the part of judge Chase in the trial of James T. Callender. We might just as well be asked for proof of malice in a case where a man wilfully and without provocation kills another. In such a case as in the one now under consideration, the answer is that the criminal intent is apparent upon the face of the act. And there is a question, sir, which strikes me as applying itself with almost irresistible force to the present discussion: Can it be that such outrages should be committed upon the most ordinary principles of law and justice, and yet the conduct of the judge not be influenced by corrupt motives? Can it be that every thing should be done to favor the prosecution and stifle the defence, and yet justice be administered "faithfully and impartially and without respect to persons?" But if all this be insufficient, I pray this honorable court to recollect the declarations of the judge in relation to the case, as attested by several witnesses.

The fifth and sixth articles rest upon grounds so extremely simple, and so easily comprehended, that it appears totally unnecessary to fatigue the patience of the honorable court, by dwelling upon them.

The seventh article is as follows:

"That at a circuit court of the United States, for the district of Delaware, held at New-Castle, in the month of June, one thousand eight hundred, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge, and stoop to the level of an informer, by refusing to discharge the grand jury, al-

though entreated by several of the said jury so to do; and after the said grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury, that he, the said Samuel Chase, understood, "that a highly seditious "temper had manifested itself in the state of Dela- "ware, among a certain class of people, particularly "in New-Castle county, and more especially in the "town of Wilmington, where lived a most seditious "printer, unrestrained by any principle of virtue, and "regardless of social order; that the name of this "printer was"....but checking himself, as if sensible of the indecorum which he was committing, added.... "that it might be assuming too much to mention the "name of this person, but it becomes your duty, gen- "tlemen, to enquire diligently into this matter," or words to that effect; and that with intention to procure the prosecution of the printer in question, the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States, the necessity of procuring a file of the papers to which he alluded, (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser,") and, by a strict examination of them, to find some passage which might furnish the ground-work of a prosecution against the printer of the said paper: thereby degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare."

The respondent stands here charged with a conduct, than which, in my opinion, nothing could be more at war with his official duty—nothing more tarnish his official character. The constitution and laws of this country certainly intended in erecting high judicial tribunals, that those who might be appointed

to minister therein, should be impartial dispensers of justice between such as might resort thither for an adjustment of their differences. In public prosecutions, more especially was it intended that such dispensation should be made without respect to persons. In these, above all other cases, ought a judge to stand aloof from influence, free from predilection towards one, or prejudice against the other. Most peculiarly here is it his duty to stand firm at his post, resisting the overbearing influence of a powerful public, and protecting the rights of the accused in so unequal a contest. But judge Chase, disregarding these principles, always held sacred in a land of laws, converts himself into a hunter after accusations. He who, in the humane language of the laws, should be counsel for the accused, becomes himself an accuser. He, whose duty it is impartially to decide between the prosecutor and prosecuted, becomes himself the procurer of prosecutions.

I have always been taught that the character of an informer, in any station of life, was deservedly considered as the reverse of reputable. What then shall we say of him, who descends from the judgment seat of the nation, to inform against, and direct the prosecution of one, against whom he avows the strongest antipathy, and over whose trial he himself has to preside? Surely, sir, his thirst for punishment was great. Surely it was extreme indeed, when he could not wait for the tardy motion of the public prosecutors. If our judges are thus to turn informers; if they are thus to seek after objects for themselves to try, and themselves to punish; then indeed must this country, heretofore considered an asylum from oppression, become itself the nursery of oppression in its most odious form. And this government, heretofore the pride of humanity, will be held up as an object of scorn and derision to the nations of the earth.

The eighth article is in these words:

"And whereas mutual respect and confidence, between the government of the United States and those of the individual states, and between the people and those governments, respectively, are highly conducive to that public harmony, without which there can be no public happiness; yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore, in the month of May, one thousand eight hundred and three, pervert his official right and duty to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their state government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States: and moreover, that the said Samuel Chase, then and there, under pretence of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion, and in a proper manner, were at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan."

It is not my intention, Mr. President, to trouble the court with many observations upon this article; not because of any opinion that it is unimportant. I

believe it equally important with any in the catalogue. I believe it possesses a peculiar importance, in affording, from the testimony by which it is supported, proofs of the spirit by which judge Chase was usually governed in his official conduct.

There are features too in that part of the judge's official conduct charged in this article, which place him in a point of view awfully grand. We have heretofore been viewing him as bringing his talents to bear upon individuals. Here we see his genius rising, in the majesty of its strength, to far higher objects. Here we see him consigning over whole governments to the scourge of his own avenging wrath. Whithersoever he turned his eyes, whether to the state constitution and laws, or to the laws and constitution of the whole union, they were equally exposed to the whip and the rack.

Mr. President, there is no truth more forcible than that expressed in the language of this article, that "mutual respect and confidence between the govern- "ment of the United States and those of the indivi- "dual states, and between the people and those go- "vernments respectively, are highly conducive to that "public harmony, without which there can be no pub- "lic happiness." Indeed, sir, it may with truth be said, that this respect and confidence are *essential* to that harmony without which we can enjoy no public happiness. What words then can describe in its proper colors, the conduct of an officer of the highest judicial tribunal of the general government, who abuses the duty and perverts the privilege of his station to destroy the confidence and excite the odium of the people, against not only their state government, but that of the United States? He who was seated on the judgment seat of the nation to execute the laws of the union, converts that very judgment seat into a forum, from whence to pronounce a Philippic not only against the state government with which he there had no right

to meddle, but against that very government under whose authority he was there sitting, and whose laws he was sworn there to execute. Not content with endeavoring to excite discontent and odium against the government of the state of Maryland, the congress of the United States must be held up as sacrilegious destroyers of the national constitution.

Mr. President, I have taken those views of this subject, which presented themselves most forcibly to my mind. I have finished all I intended to say upon the argument. There has, in my opinion, been established against the respondent a volume of guilt, every page of which calls for punishment at the hands of this nation. I leave the case and the respondent in your hands. I leave them where the constitution of this country has placed them. I leave them where I hope, and I believe, there will be found a different measure of justice from that which judge Chase has been accustomed to administer. I leave them where justice *will* be administered "faithfully and impartially, and "without respect to persons."

Mr. CAMPBELL then rose and spoke as follows;

Mr. PRESIDENT, and

GENTLEMEN of the SENATE,

It is with peculiar diffidence I rise, in compliance with the duty assigned me, to address this honorable court on this important occasion. Sensible of my own incompetency to do that justice to the investigation of this cause, which its importance, and the influence that the whole transaction is calculated to have on the jurisprudence of our country, would seem to require, I should have felt disposed to decline the undertaking; but called upon by the representatives of the nation, to aid in supporting a prosecution which they have deemed it proper to institute for the public

good, I conceive it my duty to yield up, in some degree, my own feeling to obey the voice of my country, and perform the duties imposed upon me thereby. Under this impression I shall endeavor to execute the trust reposed in me on this occasion, in such manner as the very short time left me from other public avocations, and the limited means of information on subjects of this nature, which the present situation of this place, affords, will enable me. I feel, however, sir, considerable confidence in this undertaking, from the consideration, that there are other gentlemen associated with me on this occasion, who are fully competent to do complete justice to the subject. And a still higher degree of confidence arises from a perfect conviction, that the honorable members who compose this high tribunal, and who are to pronounce the final decision in this cause, are well qualified to investigate its merits; and that their talents and experience are such as to preclude even the possibility of a defeat of justice taking place, in consequence of any deficiency that may exist in the exertions of counsel on either side.

The scene, presented to the nation by this trial, is more than usually interesting and important. One of the highest officers of the government, called upon by the voice of the people, through their representatives, before the highest tribunal known to our constitution; that same tribunal that sanctioned his elevation; to answer for the abuse of the power with which he had been entrusted. It is a melancholy truth, that derogates much from the dignity of human nature, but it is a truth that has been for ages established by experience, that high and important powers have a tendency to corrupt those on whom they are conferred. Few minds are possessed of sufficient integrity and independence, when elevated above the ordinary level of the great mass of their fellow citizens, to resist the impulse their high station gives them, to grasp at still

greater powers, and prostitute those which they already possess.

Hence it has been the great exertion of all governments, who regard the rights and liberties of the people, and still must continue to be so, to watch over the conduct of the high and confidential officers of state, and guard against their abusing the powers reposed in them. For this purpose the mode of trial by impeachment was resorted to in very early times in that country from which we have derived most of our laws and usages. Near five hundred years ago, the representatives of the people in that nation felt themselves clothed with sufficient authority to check the abuses of power, in the highest officers under the crown, by calling upon them by impeachment to answer before the house of lords for their conduct, and punishing them for such acts as were unauthorised, illegal, or oppressive.

It was a wise and politic measure to have charges of this nature tried by the highest tribunal in the nation, that would not be *awed* by the great powers and elevated standing of the accused, nor influenced by the popular voice of the accusers, further than a strict regard to impartial justice would require. As I conceive, therefore, that pure and unstained impartiality ought to be the characteristic feature in the trial by impeachment, I shall for myself, and I conceive I may in the name of the representatives of the people, utterly disclaim any design or wish, that party considerations, or difference in political sentiments, should, in the remotest degree, enter into the investigation or affect the decision of this question. Yet in order to ascertain the motives that actuated the respondent, it may become necessary to notice the difference of political sentiments, so far as regarded the accused, and those who are stated to have been injured by his conduct, at the time those transactions took place, that gave origin to this prosecution.

In the view which I propose taking of this subject, I shall in the first place notice the provisions in the constitution relative to impeachment, and endeavor to ascertain the precise object and extent of such provision so far as the same may relate to the present case.

The first provision in the constitution on this subject, (art. 1st, sec. 3.) declares, that the Senate shall have the sole power to try all impeachments.

Here we discover the great wisdom of the framers of the constitution. The highest and most enlightened tribunal in the nation is charged with the protection of the rights and liberties of the citizens against oppression from the officers of government under the sanction of law; unawed by the power which the officer may possess, or the dignified station he may fill, compleat justice may be expected at their hands. The accused is called upon before the same tribunal, and in many instances, before the same men, who sanctioned his official elevation, to answer for abusing the powers with which he had been entrusted. Men who are presumed to have had a favorable opinion of him once, are to be his judges; no inferior or co-ordinate tribunal is to decide on his case, which might from motives of jealousy or interest be prejudiced against him and wish his removal. No, sir, his judges, without the shadow of temptation to influence their conduct, are placed beyond the reach of suspicion.

The next provision in the constitution declares that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Here the constitution seems to make an evident distinction between such misdemeanors as would authorize a removal from office, and disqualification to hold any office, and such as are criminal, in the ordinary sense of the word, in courts of common law, and punishable by indictment. So far as the offence

committed is injurious to society, only in consequence of the power reposed in the officer being abused in the exercise of his official functions, it is inquirable into only by impeachment, and punishable only by removal from office, and disqualification to hold any office; but so far as the offence is criminal, independent of the office, it is to be tried by indictment, and is made punishable according to the known rules of law in courts of ordinary jurisdiction. As, if an officer take a bribe to do an act not connected with his office, for this he is indictable in a court of justice only. Impeachment, therefore, according to the meaning of the constitution, may fairly be considered a kind of inquest into the conduct of an officer, merely as it regards his office; the manner in which he performs the duties thereof; and the effects that his conduct therein may have on society. It is more in the nature of a civil investigation, than of a criminal prosecution. And though impeachable offences are termed in the constitution high crimes and misdemeanors, they must be such only so far as regards the official conduct of the officer; and even treason and bribery can only be inquired into by impeachment, so far as the same may be considered as a violation of the duties of the officer, and of the oath the officer takes to support the constitution and laws of the United States, and of his oath of office; and not as to the criminality of those offences independent of the office. This must be inquired into and punished by indictment.

This position is strongly supported by the mode of proceeding adopted by this honorable court in cases of impeachment. You issue a summons to give notice to the accused of the proceeding against him; you do not consider his personal appearance necessary; you issue no compulsory process to enforce his personal attendance; and you pass sentence, or render judgment on him in his absence. But in all criminal prosecutions, compulsory process must issue

at some stage of it to enforce the defendant's appearance; unless outlawry in England be considered an exception, which, it is believed, is not resorted to in this country, and his personal appearance is considered absolutely necessary; and in almost every case he must be present when sentence is pronounced against him. This construction of the constitutional provision appears to be absolutely necessary, to avoid the absurd consequence that would arise from a different construction; that of punishing a man twice for the same offence, which could not have been intended by the framers of the constitution. The nature of the judgment which you are bound to render, and not to exceed, appears also conclusive on this head. You can only remove and disqualify an individual from holding any office of honor, trust, or profit. This cannot be considered a criminal punishment; it is merely a deprivation of rights; a declaration that the person is not properly qualified to serve his country. Hence, I conceive, that in order to support these articles of impeachment, we are not bound to make out such a case as would be punishable by indictment in a court of law. It is sufficient to shew that the accused has transgressed the line of his official duty, in violation of the laws of his country; and that this conduct can only be accounted for on the ground of impure and corrupt motives. We need not hunt down the accused as a criminal, who had committed crimes of the deepest die; and this honorable court are not authorized to inflict a punishment adequate to such crimes, if they had been committed and could be established. With this view of the meaning of the constitutional provision relative to impeachments, I shall proceed to examine the articles now under consideration, and the evidence given to support them. In the course of this examination, we apprehend, it will clearly appear, that the whole conduct of the judge in the several transactions, for which charges are alleged against him, *had its*

origin in a corrupt partiality and predetermination, unjustly to oppress, under the sanction of legal authority, those who became the objects of his resentment in consequence of differing from him in political sentiments; turning the judicial power, with which he was vested, into an engine of political oppression. So completely, it is conceived, has this motive pervaded the whole of his judicial transactions now in question, that there is not a single act charged in the articles of impeachment, that is not strongly marked with manifest oppression, springing from political intolerance, under the mask of administering justice. This is the corrupt origin from which have issued all the evils complained of; this has for ages been the scourge of society; and it is all important, that in our country, which is yet in its infancy, when this poisonous germ cannot have taken deep root, it should be crushed in its embryo, and not permitted to gather strength by the sanction of high and superior authority.

In order to observe some arrangement in the investigation of this subject, I propose to consider, first, under one general view, the conduct of the judge on the trial of Fries for treason, as stated in the charges contained in the first article; and,

Secondly, I will consider also under one general view, the conduct of the judge in the trial of Callender for a libel, as stated in the several charges contained in the second, third, and fourth articles of the impeachment. The fifth and sixth articles I will leave to be supported by those gentlemen associated with me in the management of this prosecution, who have been more conversant than myself with the laws of, and practice of the courts, in Virginia, upon which the support of these articles materially depend; and the remaining articles, to wit, the seventh and eighth, will be chiefly relied upon by me, to shew the spirit of oppression, partiality and political intolerance, that

marked the whole judicial career of the judge, during the course of these transactions, thereby establishing more clearly the motives that actuated his conduct in the several acts charged as misdemeanors in the articles already noticed and relied upon.

In examining the first article, I shall rely upon the following positions:

First, that under the eighth article amendatory of the constitution of the United States, (referred to in this article of the impeachment) which secures to the defendant in all criminal prosecutions, the assistance of counsel, he is thereby entitled to the *right* of such counsel being heard in his defence by the court, before a decision be made and declared against him on the law arising in his case, and also, that such counsel should exercise their professional rights in making his defence, according to the known and established laws and usages of the nation, free from any arbitrary control or restriction whatever.

Secondly, that in the trial of Fries for treason, the judge did, by delivering an opinion in writing on the law arising in the case, before counsel were permitted to be heard in his defence, effectually deprive the defendant of any benefit from the assistance of counsel.

Thirdly, that he imposed on the counsel engaged for the defendant, arbitrary restrictions and control, in the exercise of their professional rights, unknown to, and unauthorized by the laws and usages of the nation, which compelled them to relinquish the defence of the prisoner.

Fourthly, I will then insist that this conduct was such a flagrant violation of his duty, as could only spring from corrupt motives, and a disposition to oppress those who became the objects of his resentment.

With regard to the first position, that counsel ought to be permitted to be heard for a defendant before a decision should be declared against him; and also that the counsel ought to be protected in the exercise

of their professional rights, according to the usages and practice of courts, it appears to me substantially supported by the constitutional provision already noticed, securing to the defendant the assistance of counsel, and to be a necessary consequence of that provision; and essential, in order to give it effect. For in the first place, as to the law, of what use would the assistance of counsel be to the defendant, if a decision of the law arising in his case should be deliberately made up by the court, committed to writing to give it more solemnity and effect, and delivered, or made known, before such counsel were permitted to be heard in his defence? What hopes could the counsel entertain of being able to convince a court, that an opinion, thus deliberately formed, and solemnly made known, was incorrect and ought not to have been given? Surely if the right to the assistance of counsel, secured to a defendant, means any thing, it must mean that he should have an opportunity through his counsel, to make his case known to the court, to explain the law arising thereon, and shew, as far as it could be done, that according to the true construction of the law applying to his case, or under which he is charged, he is not subject to its penalties; before their opinion be declared on the subject, while the mind of the court is unbiassed, open to conviction, and capable of duly weighing the arguments that may be advanced on either side. But when an opinion is deliberately declared, or made known, against a defendant before he is permitted to be heard by counsel, his case is prejudged, the character of the court is committed in a very great degree to support such opinion, the arguments of counsel cannot be expected to be heard by such a court, with impartiality and fairness, that go to prove such opinion to be erroneous; and under such circumstances, the aid of counsel is a mere name without a benefit; a form without substance. But again, if such counsel were subject to the arbitrary

control and restriction of a court, of every capricious and irritable judge; if they were not protected in the performance of their professional duties, so long as they acted within the laws of their country and the known usages and practice of courts, of what use would their assistance be to the accused, or what substantial aid could they afford him in making his defence? The counsel would have no rule to direct them in shaping their client's defence. When they had prepared to examine his cause in the manner heretofore usual in courts, and upon grounds, which they conceived most likely to establish his innocence and procure his acquittal, they might be stopped at the very threshold of the defence, surprised with a new and unheard of mode of proceeding; presented with a digested and formal opinion upon the very points they intended to contest; and informed that in the remarks they might be permitted to make to the court, to shew that such opinion was not correct, they must confine themselves in their endeavors to establish the doctrine they might advance, to the producing of authorities of a certain description; and must not extend their researches after decisions, on similar cases, beyond certain prescribed limits, as to time and the kind of decisions. Under such circumstances no counsel could render any substantial service to the accused; none would be found to submit to the tyranny of such a practice.

Further, it is conceived an universal rule of construction, that when a right is secured to any person, by a law, the means of acquiring the benefit of that right are thereby also secured to him. The constitution secures to the defendant in all criminal cases the assistance of counsel in his defence; the only means by which the benefits of that right can be obtained by such defendant, it is conceived, must be, by permitting counsel to be heard in his behalf, before his case is decided against him, and by protecting such coun-

sel in the due performance of their professional duties. These rights are secured to counsel for the benefit of those for whom they are concerned, and whose interests they advocate; and not for their own advantage. And here it may be proper to observe, that though counsel may be considered in some respects as officers of the court, and in a certain degree subject to their control and direction; yet, it is certain, while they act within the line of their duty, and the known sphere of their action as counsel, their rights are as sacred as those of the court; and they are, in performing their professional duty, in a certain sense, as independent of the court, as the court are of them.

The *second* position proposed to be established and relied upon, to wit, that the judge did, in the trial of Fries for treason, by delivering an opinion in writing on the law arising in the case, before counsel was permitted to be heard in his defence, effectually deprive the defendant of any benefit from the assistance of counsel, is in part a deduction from the preceding position and supported by it. The fact of the judge's delivering an opinion in writing, in this case, against the defendant, previous to permitting counsel to be heard in his defence, is admitted by the judge in his answer, and is also established beyond a doubt by the evidence of Messrs. Lewis, Dallas, Tilghman, and indeed of all the witnesses on the subject. No difference exists in the evidence of the different witnesses with regard to the written opinion being delivered before the cause was heard. The statement briefly is, that after the court met, the jury were called and many of them answered and appeared; the prisoner was (Mr. Lewis believes) in court; the counsel assigned the prisoner, had not all got to the bar; when the judge handed down, or threw on the clerk's table, several papers, each containing the opinion of the court on the law that was to decide the defendant's fate; one of these copies, the judge said, was to be

given to the counsel for the defendant; one to the attorney for the United States, and one to be delivered to the jury before they retired on the case. Some of the gentlemen about the bar began to copy these papers: Mr. Lewis, one of the counsel for the defendant, refused to receive or read it, declaring his hand should never be tainted by reading a prejudged opinion in any case, but especially in a capital one. The papers were subject to public inspection; the jurymen then might, and probably did, read the opinion. Thus the formal opinion of the court on the law, being made known to the jury before the cause was heard, would bias their minds against the defendant, and render an impartial inquiry into his case next to impossible. The counsel had no hopes of changing an opinion thus deliberately and formally made up, and stamped with the solemnity of a written sentence; the judge by deciding the law seemed to have decided the facts also, as he must have assumed them as proved, in order to found his opinion upon them; and indeed the answer states that no doubts existed with regard to the facts, or evidence in the case on either side; the jury would, therefore, consider such opinion as a decision of the whole case, and would be prepared, so far as they could be influenced by the judge, to pronounce the defendant guilty, before they heard the cause examined, or even a syllable of the evidence. In a case thus situated, how could the defendant be said to enjoy the benefit of the assistance of counsel; when the whole case was decided before counsel was permitted to be heard; and no ground left for them to occupy. This mode of proceeding, adopted by the judge, was, therefore, a direct violation of the constitutional right secured to the defendant, of having the assistance of counsel in all criminal prosecutions; for it cannot be pretended that to hear counsel after the cause was substantially decided, would be complying with the true intent and

meaning of the constitution; for this would render the provision totally futile and useless, and would be calculated only to deceive unfortunate defendants, who might place reliance upon it. The judge, in delivering this opinion, introduced a mode of proceeding new and before unknown in our jurisprudence; and contrary to the known and established usages and practice of the courts in our country; all the legal characters that have been examined as witnesses on both sides, and most of the witnesses to this article were legal characters, prove the fact, that no such practice ever did exist in this country; not one solitary case can be adduced of a similar proceeding by a judge, either in this country, or in that from which we have taken most of our laws and usages. The writers on the laws of England afford no instance of this kind; and it was left for judge Chase to introduce this extraordinary and before unheard of mode of administering justice.

But it is insisted on, by the judge in his answer, that the opinion was a correct one, as to the law of treason, supported by former decisions, and therefore, there would be no harm in making it known, at the time and in the manner he did; that it could not mislead the jury, but would guard them against being imposed upon by the ingenuity of counsel. Though this reasoning may appear plausible at first view, it will be found, upon examination, to be fallacious, tending to establish a dangerous doctrine, that would in principle go the whole length of justifying a judge, for dispensing with the intervention of a jury altogether in trials for crimes. If a judge may give a solemn opinion against a defendant in a criminal case, without permitting counsel to be heard in his behalf, when the party is entitled of right to the assistance of counsel, and then justify such conduct by shewing that the opinion itself was correct, and must have been delivered by him in some stage of the trial; why may he not pass sentence of execution upon a criminal

without the verdict or intervention of a jury? And, when charged with this conduct as unconstitutional and illegal, justify himself by shewing that the sentence he passed was a correct one, that the facts in the case were notorious and admitted on all hands; that the law was clear and had been established by former decisions that could not be shaken; and that, therefore, the intervention of a jury could be of no service to the defendant, as they must find him guilty; and that as he would have to declare the same sentence he had pronounced, after their verdict should have been rendered, it could do no harm to pronounce it without such verdict; as it could not do an injury to pass a correct sentence at any time. This reasoning would be of the same kind with that advanced by the judge in the case before you, to justify him in delivering a written opinion, before the cause was heard, or the defendant permitted to make his defence by counsel; for if in the one case it would be a violation of the constitutional right of a trial by jury, secured to defendants in criminal prosecutions; so in the other case it would be equally a violation of the constitutional right secured to defendants of having the assistance of counsel in their defence. The reasoning therefore of the judge, if it proved any thing, would prove too much; it would virtually destroy the most valuable provisions in our constitution for the protection of the rights and liberties of the citizen; and authorise a judge or court at pleasure to dispense with constitutional restrictions, when they found it convenient so to do.

But in the present investigation, the correctness or incorrectness of the written opinion delivered by the judge, is not in question; this opinion is not charged to be in itself incorrect or erroneous, but the offence charged is in the manner and time of delivering it; the attempt therefore by the judge to justify his conduct, by insisting that the opinion delivered was correct and authorised by former decisions, is a mere evasion of the

real charge alleged in the impeachment, and an exertion to prove what was not denied or put in question. It cannot, therefore, in fact aid the accused, or make his case better than it would be if such opinion had been evidently erroneous; but it is not intended, in this place, to admit the correctness of the opinion delivered by the judge in writing, by not going into the discussion of it; but this discussion of the opinion is omitted here, because its correctness or incorrectness is irrelevant to the present question, and, therefore, unnecessary to be discussed.

I will now proceed to consider the third position stated, to wit, that the judge did impose on the counsel engaged on behalf of Fries, arbitrary restrictions and controul, in the exercise of their professional rights, unknown to, and unauthorised by the laws and usages of the nation. In support of this part of the charge, there is the evidence of Mr. Lewis, who states that when the judge delivered the written opinion in the manner already noticed, he observed that on the former trials, there had been a great waste of time, by counsel making long speeches to the jury on the law as well as on the fact, and stated his disapprobation of their having been permitted to read certain statutes of the United States, relating to crimes less than treason, which he or the court declared they would not suffer to be read again, and that cases at common law, or under the statute law of England, previous to the English revolution, had nothing to do with the question, and that they would not suffer them to be read; that they had made up their mind on the law. This is in substance the evidence of Mr. Lewis on this point; and it is strongly supported by that of Mr. Dallas, who, though he was not present when this statement was made by the judge, yet corroborates the truth of it by the statement he made to the court afterwards on the same day, as made to him by Mr. Lewis, and by the circumstances that took place in

consequence thereof. Mr. Dallas also states that the judge said, as he thinks on the next day, that in arguing upon the law the counsel must address the court alone and not the jury. The evidence of Messrs. Rawle and Tilghman, support most of these facts in substance, except as to the judge refusing to permit the statutes of the United States to be cited, and differ only as to the time at which the judge made these declarations; these facts, therefore, are supported by evidence that cannot be shaken; and were the evidence given by Mr. Lewis and Mr. Dallas, different from that given by Messrs. Tilghman, Rawle and others, more weight and credit ought to be given to the evidence of the former gentlemen than to that of the latter, though all may be men of equal integrity and veracity; for there is a material distinction between the credit due to witnesses as men of integrity and veracity, and the weight or credit that ought to be given to their evidence as containing a correct and full statement of facts: two men may be of equal credibility in society, and equally tenacious of deposing the truth; yet the evidence of the one, as to a particular transaction, may deserve much more weight and credit than that of the other, in consequence of his possessing better means of information, and being so circumstanced as to feel more interest in, and receive stronger impressions from the facts that may have taken place; so in the the question before us, Mr. Lewis and Mr. Dallas felt the strongest interest in the transaction that took place; their rights as counsel were invaded, and the impressions they received were strong, and not easily effaced. Mr. Lewis had the most correct means of information; his attention was arrested by the paper containing the opinion being handed or offered to him; the statement of the judge containing the restrictions already stated, immediately followed, to which he attended; he could not, therefore, possibly be mistaken; and the impression,

so strongly made by so extraordinary a transaction, could not be erased from his memory. This was not the case with Messrs. Rawle and Tilghman; for though Mr. Rawle was concerned for the prosecution, he states he was much engaged with other business; the opinion delivered was also in favour of his side of the question, and of course the affair was not likely to excite so much the interest of those gentlemen, or make so deep an impression on their minds. The evidence, therefore, of Mr. Lewis and Mr. Dallas, may be considered as a correct statement of this transaction. These restrictions, therefore, imposed upon the counsel, of not citing such authorities as were usually permitted to be used, and not arguing the law to the jury, are unauthorised by the laws of our country, and contrary to the usages and practice of our courts of justice; and in the case in question, amounted to a prohibition to argue the cause in any possible way that could be of the least service to the defendant. That these restrictions were unauthorised by the practice in our courts, is established by the evidence of every witness that has been examined to this point, who declared that no such restrictions had ever been imposed on counsel concerned in criminal cases, in any courts with which they had been acquainted, and particularly by the practice of the circuit court of the United States, in the same state, in the trial of the same cause before, and in other similar trials, when the utmost latitude was given the counsel in making their defence. This was, therefore, a direct and arbitrary innovation on the known and established modes of proceeding in courts of justice in criminal cases, and an unwarrantable attack on the privileges secured to defendants by the constitution and laws of the country. That judges are not authorised to substitute their own arbitrary will in place of law, and to dispense, at pleasure, with the established rules of proceeding in the tribunals of

justice, is proved by every principle of reason and of law. To shew that this position has been expressly recognized by law writers, and legal decisions for ages, I will refer the court to 2d Bac. Ab. (new edition) page 97, where it is declared that *judges are to determine according to the known law and ancient customs of the realm;* and to 4 Com. Dig. 418, where it is stated that *judges ought to act conformably to law and not according to discretion.* These authorities, when we consider the country from which they come, and the times in which they were written, strongly mark the limits that ought to circumscribe the conduct of the judge. And shall the judges in our country assume greater latitude in their proceedings than those of England, and depart at pleasure from what are known to be the customs of the country? I should presume not. But the judge states in his answer, that decisions at common law, and before the revolution in England, could throw no light on the doctrine of treason here, but might mislead the jury; and therefore ought not to be admitted to be read, not being law; and he wades into the dark ages of the history of England, when the judges were corrupt and under the influence of the crown. This reasoning of the judge is evidently an evasion of the point in question. The object of the counsel for Fries, in wishing to cite those authorities, both at common law and under the statute of Edward the Third, was not to shew by them what the construction of the words of our constitution with regard to treason ought to be; but to shew first, the absurd and ridiculous lengths to which those decisions had gone, in determining what acts amounted to treason there, and then to prove that since the English revolution, the judges in England considered themselves bound by cases decided before the revolution, and that as the decisions on treason in England, since their revolution, were bottomed upon those cases before the revolution, they ought not to

govern the courts in this country, in giving a construction to the words of our constitution, in order to determine what acts amounted to treason. This was evidently the object of the counsel, and it is proved to have been so stated by them, by the evidence of Mr. Lewis, Mr. Dallas, and Mr. Rawle. There was, therefore, no ground for the pretence the judge makes for refusing these authorities to be introduced.

It is admitted by the answer that the jury have the right to decide upon the law as well as upon the fact; and if it were denied, it could be shewn by clear and undoubted authorities, of ancient and modern times. From what motives, therefore, and under what plausible pretence, could the judge refuse to permit the law to be argued before the jury? How could they decide upon it properly, without hearing it discussed? And with what color of reasoning can the judge say that the jury have the right to decide the law, and yet that they have not the right to hear it argued and explained by counsel? Does not this shew the greatest absurdity, and prove that the accused must have had some object in view, that he did not chuse to avow, and that would not bear examination? In this case there was no dispute about the facts; the answer states, they were admitted on both sides. The judge makes up his opinion upon the law, commits it to writing, and makes it known as the opinion of the court, before the jury are impannelled in the case. For what purpose was counsel assigned to the defendant? What remained for the counsel to examine or contest, when the facts were admitted and the law decided by the court? Would not the assistance of counsel, under such circumstances, be to the defendant a mere phantom, a name without substance? Was not the assignment of counsel, in this case, and with such views as the judge must have had, an useless ceremony, an empty compliance with form, a mere mock of justice? The clear inference from the whole transaction must be,

that the judge was determined the defendant should derive no benefit from the assistance of counsel, and only affected to permit them to argue the facts to the jury, because he knew they were not disputed, even by the defendant himself. It must, therefore, be a fair inference that the defendant was deprived of the assistance of counsel, by the unwarrantable, illegal, and unauthorized restrictions imposed upon them in the performance of their professional duties by the judge.

It remains, on this part of the subject, to shew that this conduct of the judge was such a flagrant violation of his duty, as could only spring from corrupt motives, and a disposition to oppress those who became the objects of his resentment. I lay it down as a settled rule of decision, that when a man violates a law, or commits a manifest breach of his duty, an evil intent, or corrupt motive must be presumed, to have actuated his conduct; as every man is presumed to know the law, and every officer or judge to understand his duty; and if the party will undertake to excuse himself, for misconduct, on the score of pure motives, and unintentional error, it is incumbent on him to make the same appear by satisfactory and incontestible evidence. In some instances, erroneous conduct may be explained, excused, or palliated, by the weakness or ignorance of the delinquent, and the circumstances that attend the case. But in this whole transaction, what marks of innocence, or pure motives are to be discovered? What excuse to be offered for the conduct of the accused? Ignorance of the law cannot be relied upon as forming a ground of excuse. The legal talents, long experience, and distinguished abilities of the judge, are too well known to admit of such a plea. It was no new and difficult case, wherein he might be easily mistaken. There were no former precedents to lead him astray. The proceeding was entirely new, and of his own inven-

tion; a total deviation from all former practice, and a manifest innovation upon the established usages in our courts of justice. The whole bar were agitated by the proceeding; counsel of near thirty years practice felt embarrassed and astonished at it. The common sense of the whole audience appeared shocked at the transaction, as being altogether new and extraordinary. The accused, in his answer, states, that he relied upon the decisions of the circuit courts, wherein judges Iredell and Paterson presided, with regard to the law of treason, as forming a precedent from which he would not even dare to depart, Why did he not consider himself equally bound by the practice they adopted in criminal cases? They gave the utmost latitude to counsel in making their defence to the jury, both on the law and the fact, did not restrict them as to the authorities they should cite, and delivered no opinion until the cause was heard. Judge Chase reversed the whole of this mode of proceeding. What good reason can be given for his adhering to their opinion in the one instance, and totally departing from their practice and example in the other? No excuse can be formed for this conduct. This is the strongest possible evidence of corrupt motives, of partiality, and a determined design to overleap all former rules of proceeding, to oppress the unfortunate defendant, that was arraigned at his bar for trial. The whole course of the judge's conduct in this transaction goes to establish the same spirit of oppression. Counsel are assigned the defendant, merely for the sake of form, and, as it were, to mock him in his misfortunes. The day of trial arrives. In the mean time the judge makes up his opinion on the law arising in the case, and, to add solemnity to the act, commits it to writing. There is no doubt, no dispute as to the facts. The prisoner is brought to the bar. Not a voice is permitted to plead his cause, until the solemn sentence of his legal conviction is made known; and

thereby the avenues of his defence, that might lead to his acquittal, for ever closed.

Here let us pause a moment, and behold the unfortunate, and, in the language of his able counsel, poor Fries, trembling before his condemning judge; stript of the aid of counsel, his only and forlorn hope; the fatal fiat of his condemnation pronounced in the solemn language of a written opinion; and thus friendless, unprotected, and unheard, about to be consigned to the hand of the relentless executioner! Let us view this spectacle, and then let me ask, if this can be considered an impartial administration of justice. I might here charge the accused with having knowingly and wilfully trampled on the laws of his country, and overleaped the bounds of legal justice, to oppress a friendless individual brought before him for trial. I might call upon this honorable court, to vindicate the character of insulted justice, and demonstrate to the American people, that when their rights and liberties are invaded, even though under the sacred sanction of judicial authority, this high tribunal will always be found ready and willing to avenge their wrongs and protect their interests.

But it is alleged by the judge, that the offensive written opinion, that had been made known, was withdrawn, and that next day full latitude was offered to the counsel to argue both the law and the facts to the jury. This was a fallacious offer; it came too late to be of service to the defendant, or excuse the judge. The act on his part was done; the offence was complete; and it was only the sternness of the counsel that made him retract. The impression had been made on the minds of the jury, that could not be erased....the flame had been kindled by the fire-brands he had scattered, which could not be extinguished by withdrawing the instruments that occasioned it. The experiment was as dangerous as it was novel, and can only be ascribed to the same spirit of oppression and

political intolerance, that will be found to distinguish the whole conduct of the judge in his judicial career, during these transactions.

The respondent further insists, in his answer, that he cannot be impeached, except for some offence for which he may be indicted at law. This position cannot be supported by any fair construction of the provision in the constitution on this subject. It has already been attempted to be shewn in the view taken of this constitutional provision, that in order to support an impeachment, it is not necessary to shew that the offence charged, is an indictable one, but only that it is a breach and violation of official duty; and I conceive that this is the only construction that can be adopted to give consistency to the constitution; to the mode of proceeding adopted under it in cases of impeachment; to reconcile with justice the nature of the judgment that must be rendered upon conviction, and to avoid the palpable absurdity that would follow a different construction, of punishing a man twice for the same offence. To the exposition already given of this provision in the constitution, I beg leave to refer the court as controverting the position here relied upon by the judge. But I would here further observe, in support of this doctrine, that according to the laws of England, a judge of a court of record is not accountable by indictment, for any thing done in open court, in his judicial capacity; and that he may plead to an action brought against him, for any such act, that he did it, (that is, what he was charged with) as a judge of record; and it would be a good justification. In support of this doctrine the court are referred to 2 Bac. ab. (new ed.) page 97....2 Hawk. 123.... Jac. Law Dictionary, (new ed.) verbum Judges. It appears from the same authorities, that the judges in England, are accountable in parliament only, for opinions delivered by them in court; and are not, for such opinions, to be questioned before any other tri-

bunal. This is the great protection and security that judges of courts of record have, that they are accountable for their official conduct only to the legislature; and are punishable at law only for such acts as would be indictable offences, independent of their official character. This view of the subject renders the judges, so far as regards their judicial conduct, independent of all tribunals except the legislature; and is certainly better calculated to preserve the independence and dignity of the judges, than that contended for in the answer. I cannot, therefore, entertain a reasonable doubt, that the true intent and meaning of the constitution will support this doctrine; and that it will be sanctioned by the opinion of this honorable court.

Mr. Campbell here observed that he had closed the remarks he proposed making on the first part of the subject, and, finding himself indisposed, expressed a wish that the court would adjourn.

Whereupon, the court rose.

THURSDAY, *February* 21, 1805.

The court was opened at 10 a. m.

Present, the Managers, attended by the House of Representatives in committee of the whole: and

The counsel of Judge Chase.

Mr. CAMPBELL, *in continuation.*

I will now proceed, as well as my indisposition will permit, to examine in a brief manner the second part of the subject, containing the several charges founded on the trial of Callender, at Richmond, as stated in the second, third, and fourth articles of the impeachment. I will consider these several articles in the order in which the transactions on which they are founded took place in court. In order to ascertain the motives that actuated the judge, in this whole

transaction, it will only be necessary to view his conduct as proved, so far as the same relates to this subject, previous to the trial. The first account we have of the intended prosecution, or I might say persecution, of Callender, is at Annapolis. Here the judge received the famous book, called the Prospect Before Us, upon which the prosecution was founded; and here the determination was formed to convict and punish Callender. The respondent said he would take the book with him to Richmond; that the libellous parts had been marked by Mr. Martin, and that before he returned he would teach the lawyers of Virginia to know the difference between the liberty and licenciousness of the press; and, that if the commonwealth of Virginia was not totally depraved, if there was a jury of honest men to be found in the state, he would punish Callender before he returned from Richmond. This is the evidence of Mr. Mason, nearly in his own words, and no person will pretend to doubt its correctness. What language could be used, that would more clearly shew the partiality and predetermination of the judge to punish Callender, and the spirit of persecution by which he was actuated. Again, on his way to Richmond, according to the evidence of Mr. Triplett, the judge reviles the object of his intended vengeance; states his surprise and regret, that he had not been hanged in Virginia; remarks that the United States had shewn too much lenity to such renegadoes; and after arriving at Richmond, informs the deponent, he was afraid they would not be able to get the damn'd rascal that court. Thus evincing in every stage of this business that intolerant spirit of oppression and vengeance, that seems to have given spring to all his actions. After the indictment is found against Callender, the pannel of the petit jury is presented to the judge, he inquires if he had any of the creatures called democrats, on that pannel, directs the marshal to examine it, and if there were any such on it,

to strike them off. This is the evidence of Mr. Heath, whose character and standing in society are known to many of the members of this honorable court. And though his evidence is opposed by the negative declarations of Mr. Randolph, who affirms, that he did not present the pannel of the jury to the judge, or receive such directions; yet I conceive the court will give more weight to the affirmative declarations of Mr. Heath, with regard to these facts, than to the negative assertions of Mr. Randolph, who may have forgotten the transaction. This point rests upon the integrity and veracity of Mr. Heath. He could not receive the impression of these facts, unless the transaction had taken place; he could not reasonably be mistaken; the affair was new and extraordinary, and must have arrested his attention; and in this case there is no ground to make allowance for a treacherous memory; for it is not pretended that the witness, Mr. Heath, has forgot the facts, but that they never existed. If you do not, therefore, believe the statement he makes, it must follow that you admit the witness has wilfully and corruptly stated a falsehood; this I presume will not be admitted; but on the other hand, Mr. Randolph may have forgotten the transaction, in the bustle of business, and this will account for the difference in the evidence of the witnesses without impeaching the veracity of either; this mode of reconciling the evidence is agreeable to the rules of law. I take the facts, therefore, as stated by Mr. Heath, to be correct, and they afford an instance of judicial depravity hitherto unequalled and unknown in our country; a direct attempt to pack a jury of the same political sentiments with the judge, to try the defendant. This is a faint representation of the previous conduct of the judge, relative to this subject, before whom the defendant was about to be tried; or rather before whom he was to be called for certain conviction and punishment; for it ought not to be dignified with the

name of a trial. With this view, therefore, of the temper and disposition of the judge, and of his previous conduct on this occasion, we will examine the first important step taken in the trial, in which the designs of the judge begin more clearly to unfold themselves, viz. his refusal to postpone or continue the trial until the next term, on an affidavit regularly filed, stating the absence of material witnesses and the places of their residence, being the second charge in the fourth article.

It is admitted by the respondent, in his answer, that an affidavit was filed, which he exhibits to the court, and a motion made thereupon by the counsel of Callender to continue his cause for trial until the next term; and it is proved by the evidence of Mr. Hay and Mr. Nicholas, that as counsel for Callender, they insisted for a continuance of the case, on the grounds stated in the affidavit, and also on other grounds; that they were not prepared to argue the law arising in the case, for want of time to examine the subject, and that the defendant was not, by the laws of Virginia, bound to come to trial that term. Here it may be proper to shew what are the grounds for a continuance known in law, and to inquire whether those stated in the affidavit come within the decisions heretofore made in courts of justice. On this subject I will refer the court to one authority only, but one equally respectable with any that can be produced on criminal law. Foster Cr. Law, page 2 and 3. Here Mr. Campbell read the case at length, and then observed, that this decision took place in a country where criminal law is executed with as much rigor as in any in the world where there is the shadow of liberty; and yet the affidavit filed in this case, upon which a continuance was granted, only states the absence of material witnesses and the places of their abode; the defendants were not required to state the facts that those witnesses would prove. In ordinary

cases the courts do not require this, and in many cases it would be impossible for the defendant to know all that a witness could give in evidence; nor is the defendant bound, except in extraordinary cases, to disclose the evidence that his witnesses, who are absent, can give, as it might endanger his defence and give an advantage to the prosecutor, if so disposed, to procure evidence, whether true or false, to controvert that of the defendant. The court in the case cited was held by a special commission from the crown, for the purpose of trying offenders for crimes of the deepest die, and such as are punished in that country with the utmost rigor; yet the court continued the cases of those defendants for such a length of time, as was deemed sufficient to procure their witnesses according to the distances at which they resided. There were in this case no stated terms to which the court could adjourn and continue the causes; they, therefore, fixed upon a reasonable time and adjourned over to such day, in order to enable the defendants to prepare for trial; and it was observed by the court in that case as an additional ground for continuance, that the indictments had not been found until the court sat, and that, therefore, the defendants had not time to prepare for trial. This was the case with Callender; he had no notice of this prosecution until after the indictment was found, and during the same term; he, therefore, could not have had time to prepare for his trial. The affidavit he filed was stronger and much more full than that in the case cited; it states the absence of a number of witnesses, whose evidence the deponent declares material to his defence. This would be sufficient to authorise a continuance upon a first application, and more ought not to have been required; but the affidavit goes further, and states the substance, as far as the defendant knew, of the evidence the witnesses could give; and also states the want of papers and

books, material to the defence, that could not be obtained without allowing a considerable time to procure them. What more could be stated in an affidavit, for a continuance on the gound of want of testimony, by any defendant who wished to adhere to the truth? Yet a continuance is refused; and the judge states in his answer as the principal cause of such refusal, that the evidence of all the witnesses stated in the affidavit to be wanting, would not prove the truth of all the charges in the indictment, and would not, therefore, make a complete justification if procured; and enters into an examination of the charges and evidence to prove this position. This excuse of the accused is founded on a train of the most fallacious and sophistical reasoning that can be resorted to, and is no more than a groundless apology, by which, if possible, to evade the true question, and avoid the odium that ought and must attach to such a transaction. It is not denied by the judge that the absent witnesses would prove in part the charges in the indictment; but he says it ought to appear, they could prove the whole. By this rule, in order to obtain a continuance, the party must shew to the court the whole of the evidence necessary to support his case, and the judge is to compare the evidence with the charges, and must be satisfied that it is sufficient to cover the whole of the case, or he will not grant a continuance; this doctrine is too absurd to require a refutation; it would destroy all the benefit that could arise to parties from the right, so well established in law, of continuing causes upon affidavit of absent material witnesses; and subject the right to a fair and impartial trial, to the mere arbitrary will of a judge, who would thus assume the right to weigh the evidence wanted, and measure its materiality by his prejudice against the party; this would in fact, tend in many instances to destroy the trial by jury, and reduce it to a mere form without substance; for the

party could not state on oath all that his witnesses could prove, once in a hundred times. But the answer states that the court proposed to postpone the trial for a month, and some of the witnesses go further than the accused himself and say for six weeks; and this is relied upon as shewing the disposition of the judge to accommodate the defendant. This is a pretence to accommodate that could answer the defendant no valuable purpose. The absent witnesses resided at such great distances, that most of them could not be procured in that time, and this the judge well knew. He even states in his answer, that they lived at such great distances as left no reasonable ground to believe they could be procured at the succeeding term, being six months, and yet pretends that one month or six weeks would be sufficient. But here I must notice, that it is remarkable the counsel for the defendant never heard of this proposed postponement; and I must therefore conclude it was not seriously made; but if it was it only proves that the judge was determined to try Callender himself, and would not, therefore, on any ground whatever, continue the cause to a succeeding term, at which he was not to be present. He had before determined to punish Callender, and could not trust his case to the management of any other judge. This is of a piece with the rest of his conduct on this occasion, and presents this honorable court and the world with an instance of the most flagrant abuse of common justice, under the sacred sanction of administering the law for the correction of offenders.

The next charge which I propose to examine is contained in the second article of the impeachment, and consists in the judge's over-ruling the objection of John Basset, one of the jury, who wished to be excused from serving on the trial of Callender, because he had made up his mind as to the book from which the words charged to be libellous in the indictment

had been drawn. The constitution secures to defendants charged with crimes, the right of a trial by an impartial jury; any thing, therefore, that goes to shew that a man has made up an opinion with regard to the guilt or innocence of the accused, or with regard to the matter in question, or decided it in his own mind, proves him to be disqualified to serve as a juror, because it proves he is not impartial, has a bias upon his mind, and cannot be said to be indifferent. The same doctrine is supported by the laws of England. In order to shew this, I will refer the court to 3 Bac. Ab. (new ed.) 756, and also Co. Litt. 158; where it is stated, if a juror has declared his opinion, touching the matter in question, &c. or has done any thing by which it appears that he cannot be indifferent or impartial, &c. these are principal causes of challenge; and therefore such juror would be disqualified. Here it is manifest, that though declaring an opinion is good cause of challenge to a juror, if it is not necessary he should declare such opinion in order to disqualify him; it is sufficient that he has done something, whether making up an opinion, or doing any act whatever, by which it appears he is not indifferent, is not perfectly impartial. The objection, therefore, made to Basset as a juror, ought to have been sustained, and he ought to have been excused from serving on the jury, upon two grounds. First, because he had made up an opinion with regard to the matter of the charge against Callender. This is proved by the evidence of Basset himself, who says, he had seen in a newspaper, extracts stated in the publication to have been taken from the Prospect before Us; and he stated to the court on the trial, that he had made up his opinion, that those extracts were seditious, and that the author of the book called the Prospect before Us, or that from which these extracts were taken, was within the sedition act, and therefore punishable under it. It was at the time no-

torious and well known that Callender was the author of the Prospect before Us; it was equally notorious and known, that the indictment against him was founded on that book; and Mr. Basset stated, he had no reason to doubt that the extracts were taken from that book as stated in the papers. Is it not, therefore, clear, that forming an opinion with regard to the extracts, was forming an opinion with regard to the matter charged as libellous in the indictment? No reasonable doubt can exist on this point, and though Mr. Basset did not hear the indictment read, as the court refused to permit it to be read until the jury were sworn, a measure under such circumstances as extraordinary as it was new; yet he knew the subject matter it contained as well as if he had heard it. The opinion, therefore, that he had made up his mind on this subject, clearly proves he was not indifferent, was not impartial; he had decided the guilt of Callender, in fact, in his own mind, and could not be expected to shake off the effect of such prejudication. He was, therefore, according to the constitution, and the law already cited, disqualified from being a juror, having done an act that shewed he was not indifferent, was not impartial, and ought of course to have been excused from serving on the jury. He ought also to have been rejected as a juror on a second ground; because he had not only made up an opinion on the matter in question, but had declared that opinion in public. It is proved by the evidence of Mr. Basset himself, as well as by that of Mr. Hay and Mr. Nicholas, and also by that of Mr. Robinson, that when he was asked whether he had formed and delivered an opinion upon the charge in the indictment, he stated, that although he had never heard the indictment read, yet he had formed an opinion that the author of the Prospect before Us was within the sedition act. This, as has been already insisted upon, was the same as forming an opinion upon the charges in the indictment,

as he knew the indictment was founded upon that book; and this opinion, which he had formed, he then declared in open court, in the hearing of all bystanders, and before he was sworn as a juror. This was, therefore, according to the rule laid down by the judge and the question he declared proper to be asked, a complete disqualification of Mr. Basset from serving as a juror on that trial. For he had formed and delivered an opinion on the matter in question. And what difference could it make, whether such opinion was delivered a minute or an hour before the juror was sworn on the trial, or a week, or a month before? Certainly the effect on his mind must be the same, and he must be equally unfit to serve as a juror in either case. On both of these grounds, therefore, Mr. Basset ought certainly to have been rejected from serving as a juror on the trial of Callender; and this is so glaring an innovation on the impartiality of trial by jury, (*the security* of our rights and great *bulwark* of our liberties,) that when taken in connection with the rest of the judge's conduct, it strongly evinces an overbearing disposition, that would not stop at the use of any means, however unjust and illegal, to obtain a desired object. He had told the marshal, if he had on his list of jurors any creatures called democrats, to strike them off. He, therefore, knew the political sentiments of those who were called as jurors, to be favorable to his wishes, as no doubt his direction was pursued. Mr. Basset had declared his opinion, that the author of the Prospect before Us was within the sedition law, who was notoriously known to be Callender. He therefore knew the sentiments of the juror; knew he must be disposed to convict the defendant, and for this reason he would not excuse him from serving on the trial, but would pervert the meaning of the law to make it subservient to his own views.

The next charge to be inquired into is that stated in the third article, in rejecting the evidence of colonel Taylor, a material witness in favor of the defendant, on the pretence that he could not prove the truth of the whole of one charge. In this instance the judge acted contrary to all former precedents in courts of justice, and without the shadow of law or reason to justify his conduct. Not a solitary case could be stated by any of the witnesses of a similar conduct in a judge. The rule here adopted, with regard to the admissibility of evidence, would deprive the jury of their undoubted right to decide on the credibility and weight of evidence, as well as on the extent to which it proved the matter in question; would transfer in substance this right to the court, and thereby shake to its very centre the fabric so justly admired and held so sacred, *of trial by jury*. It would make it necessary for the party to present to the court, all the evidence relied upon to make out his case. This evidence, the court or judge would first deliberately examine, compare it with the charges or case to be supported, and if it did not, in his opinion, prove the whole of one charge, or go the whole extent of the case to be established by it, he would reject it, and not permit the jury to hear it. This would strip the jury of the very prerogative that renders this kind of trial so much superior to all others, that of deciding on the weight and credit of evidence. There is a manifest distinction between the right which a judge has to decide upon the admissibility of evidence, on the ground of its being proper or improper according to the established rules of law, and the right here assumed of deciding upon the extent to which such evidence, that is admitted to relate to the matter in question, will go to support the case: the former is the exercise of a proper authority to prevent the admission of extraneous and improper matter, wholly irrelevant to the matter in question; the latter is an arbi-

trary assumption of power, to decide on the extent to which evidence admitted to be relevant, at least in some degree, would go to prove the matter in question; and is a direct innovation on the most sacred privilege of the jury. Nothing can be more absurd and dangerous, than the consequences that would flow from such a doctrine. The judge would first weigh the evidence himself, measure its extent, reject it at pleasure, and call this a trial by jury. But I must here be permitted to notice the reasoning resorted to by the judge in his answer, to excuse his conduct on this occasion, which is as dangerous and absurd, in its consequences, as it is subtle and evasive. It is stated by the judge, that the plea of justification must answer the whole charge, or it is bad on the demurrer; and that when the matter of defence may be given in evidence without being formally pleaded, the same rules prevail. This doctrine of the judge would require the party to shew, that the evidence he offered would cover the whole of his case, with the same exactness and formality that he would file a plea to avoid its being held bad on a demurrer: thus narrowing down the province of the jury, and subjecting the decision of all the facts as well as the law to the court. There is no rule of law to warrant such a proceeding, and it is manifestly contrary to all reasoning on the subject. The plea, in order to be good, must state matter sufficient to justify that part of the charge or suit to which it is put in; the demurrer admits all the facts stated in the plea that are well pleaded, but cannot admit facts that are not stated in it; therefore the plea must appear to contain sufficient matter of justification, or it will be held bad on demurrer; but no such rule was ever heard of before to apply to evidence offered to a jury. They alone are the proper and only tribunal to decide whether the evidence offered and given is sufficient to prove the whole matter in dispute or not; and if the jury be de-

prived of this right, there is nothing left them that deserves the name of a trial.

The judge insists, if he was mistaken, it was an error of judgment. This cannot be presumed. Ignorance of the law is no excuse in any man; but in a character of such high legal standing and known abilities as that of the accused, it is totally inadmissible and not to be presumed. How could any judge with upright intentions commit so many errors, or hit upon so many mistakes in the course of one trial, as are manifest in that of Callender. They must have been the result of design, and a predetermination to bear down all opposition, in order to convict and punish the defendant.

But it is stated that judge Griffin concurred with him in opinion, and this is insisted upon by the accused in different parts of his answer, as an excuse for the errors he committed, if, as he states, they were errors. This seems to be a kind of forlorn hope resorted to, when all other expedients fail. To this argument of the judge I would in this place answer once for all, that it can be no excuse for him, nor any justification of his offences, that another has been equally guilty with himself; and it must strongly prove the weakness of his defence to rely upon this ground. Though judge Griffin has not yet been called to an account for his conduct on this occasion, that is no reason why he should not hereafter be made to answer for it. The nation has not said he was innocent, or that he will not be proceeded against for this conduct; and there is no limitation of time that would screen him from the effects of charges of this kind, if they should be brought forward and supported against him hereafter. No ground of excuse therefore can arise from the circumstance of judge Griffin not having been called upon to answer for his conduct in this respect.

I will now proceed to notice very briefly the conduct of the judge in the subsequent part of this trial. Compelling the defendant's counsel to reduce to writing all questions to be asked the witness, was a direct innovation on the practice in our courts of justice, and tended to embarrass the management of and weaken the defence. It is proved by the testimony of all the witnesses, that no such practice ever prevailed in our courts of justice, for such a purpose as that avowed in this instance; the only cases in which it is required to reduce to writing questions to be asked a witness, and the only cases in which it can be proper or consistent with reason and justice to do so, are those in which an objection is made to a question proposed to be asked, on the ground of its being improper and contrary to the rules of evidence; and in order to ascertain the precise meaning and effect of the question, so as to decide on the objection made to it, it may be proper to require it to be reduced to writing, but it never was before done, so far as we can discover, for the purpose of ascertaining how far the witness could prove the matter in question, and whether he could prove the whole of one charge or not, and thereby decide whether the witness should or should not be examined. According to this rule the judge would first try the cause himself upon the evidence offered, by the questions thus reduced to writing, and if he did not consider such evidence fully sufficient to support the whole of the charge or case to which it was offered, he would reject it, and not permit the jury to hear a word of it, lest they might consider it stronger than he did, and give it sufficient weight to support the case to which it was offered. This mode of proceeding was left to be discovered and adopted by judge Chase. No other court or judge ever attempted in this manner to trifle with the rights of the jury, and establish a doctrine so tyrannical and oppressive; but this is in perfect conformity with the

whole of his conduct on this occasion; a preconcerted system of oppression, to bring the defendant, Callender, to certain conviction and punishment. For the same purpose the defendant's counsel were ridiculed, treated with indignity, and the whole audience entertained at their expense. They were frequently and abruptly interrupted in their arguments; charged with wilfully perverting the law, in order to impose upon and deceive the multitude; called boys by way of derision, and treated as mere mushrooms of the day, who ought to cringe submissively when they appear before a circuit court in which the honorable judge presided. He was facetious, witty, and sarcastic, as the occasion required; and it is pretended there can be no harm in this; it was all in jest and good humor! It is too serious a matter, Mr. President, for judges thus to jest and trifle with the rights and liberties of the citizen. Though this proceeding was levelled immediately at the counsel, it was the defendant who was the principal object of resentment, who was intended to be made an example of, and who felt the injury and became liable to the consequences of such illegal and unjust conduct of the judge.

Barely to notice the conduct of the respondent, at New Castle in Delaware, as charged in the seventh article, is sufficient to shew that he was there actuated by the same spirit of persecution and oppression that has, as already stated, marked the whole of his conduct during the course of these transactions. That he should descend from the elevated and dignified station in which he was placed as a judge, to hunt for crimes as a common informer against his fellow citizens; urge the jury to take notice of, and present certain persons sufficiently designated though not named; and press the attorney for the district to search for evidence among the files of newspapers to support a prosecution, was degrading to the sacred

character of a judge, and was perverting the judicial authority to a mere engine of persecution to answer party purposes. Of the same complexion with this is the conduct of the respondent in delivering an inflammatory and disorganizing charge to the grand jury at Baltimore, as stated in the eighth article of the impeachment. This proceeding evinced a mind inflamed by party spirit and political intolerance: it was calculated to disturb the peace of the community, and alarm the people at the measures of government; to force them by the terror of judicial denunciation to relinquish their own political sentiments and adopt those of the judge. This was the favorite object of this whole proceeding, and to obtain it no means were left untried. It was attempted to excite the fears of the public mind, to destroy the confidence of the people in the administration of their government. The judicial authority was prostituted to party purposes, and the fountains of justice were corrupted by this poisonous spirit of persecution, that seemed determined to bear down all opposition in order to succeed in a favorite object. Citizens of all descriptions felt alarmed at this new and unusual conduct. All the counsel at the bar, wherever the respondent went, though consisting of the ablest and most enlightened in the nation, were agitated into a general ferment, and the whole community seemed shocked at such outrages upon common sense; for, to go to trial was to go to certain conviction. Is this, Mr. President, the character that ought to distinguish the judiciary of the United States? No, sir. The streams of justice that flow from the American bench ought to be as pure as the sun beams that light up the morning. The accused should come before the court, with a well founded confidence that the law will be administered to him with justice, impartiality, and in mercy. When this is the case, he submits without a murmur to his fate, and hears the sentence of condemnation pronounced

against him, with a mind that must approve the justice of the law and the impartiality of those who administer it.

The decision of this cause may form an important æra in the annals of our country. Future generations are interested in the event. It may determine a question all important to the American people; whether the laws of our country are to govern, or the arbitrary will of those who are entrusted with their administration. Mr. President, we, on this important occasion, behold the rights and liberties of the American people hover round this honorable tribunal, about to be established on a firm basis by the decision you will make, or sent afloat on the ocean of uncertainty, to be tossed to and fro by the capricious breath of usurped power and innovation.

END OF VOLUME FIRST.